

**CASE NO. 15-13224**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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**G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S  
SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT  
CORPORATION,**

**Petitioner/Cross-Respondent,**

**V.**

**NATIONAL LABOR RELATIONS BOARD,**

**Respondent/Cross-Petitioner.**

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**ON APPEAL FROM THE NATIONAL LABOR RELATIONS BOARD  
REGION 12  
CASE NOS. 12-CA-026644 and 12-CA-026811**

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**VOLUME I  
APPENDIX OF PETITIONER/CROSS-RESPONDENT**

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**VOLUME I**

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**PETITIONER/CROSS-RESPONDENT'S AMENDED CERTIFICATE OF  
INTERESTED PERSONS AND CORPORATE DISCLOSURE  
STATEMENT**

The undersigned counsel of record for Petitioner/Cross-Respondent G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation, certifies that the following listed parties have an interest in the outcome of this case:

1. Cherof, Edward M. (Attorney for Petitioner/Cross-Respondent)
2. Diaz, Margaret J. (Regional Director, National Labor Relations Board, Region 12)
3. Frazier, Thomas (Charging Party)
4. G4S Regulated Security Solutions, A Division of G4S Security Solutions (USA) INC., F/K/A The Wackenhut Corporation (Petitioner/Cross-Respondent) (GFSZY)
5. Hirozawa, Kent Y. (Member)
6. Jackson Lewis P.C. (Attorneys for Petitioner/Cross-Respondent)
7. Mack, Cecil (Charging Party)
8. Miscimarra, Phillip A. (Member)
9. National Labor Relations Board (Respondent/Cross-Petitioner)
10. Pearce, Mark Gaston (Chairman)

11. Plass, Shelley B. (Counsel for the Acting General Counsel National Labor Relations Board)
12. Schudroff, Daniel (Attorney for Petitioner/Cross-Respondent)
13. Schwartz, Jeffrey A. (Attorney for Petitioner/Cross-Respondent)
14. Spitz, Jonathan J. (Attorney for Petitioner/Cross-Respondent).

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), and Fed. R. App. P. 26.1, G4S identifies the following subsidiaries, conglomerates, affiliates and parent corporations:

1. G4S Regulated Security Solutions is a division of G4S Secure Solutions (USA) Inc. G4S Secure Solutions (USA) Inc. is a wholly-owned subsidiary of G4S Holding One, Inc. (“G4SHO”), a Delaware corporation.
2. G4SHO is a wholly owned subsidiary of G4S US Holdings Limited (G4SUSH), a British company. G4SUSH is a wholly owned subsidiary of G4S Corporate Services Limited (G4SCS), a British company. G4SCS is a wholly owned subsidiary of G4S plc, a British company publicly traded on the London Stock Exchange. It is also publicly traded on the Over the Counter (OTC) Exchange in the United States using the ticker symbol GFSZY.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 28, 2015, a copy of the foregoing **VOLUME I, APPENDIX OF PETITIONER/CROSS-RESPONDENT G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT CORPORATION** has been served via the Court's electronic case filing system which will automatically serve the following counsel of record:

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I hereby certify that on October 28, 2015, I caused to be served a true and correct copy of the within and foregoing **VOLUME I, APPENDIX OF PETITIONER/CROSS-RESPONDENT G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF G4S SECURITY SOLUTIONS (USA) INC., F/K/A THE WACKENHUT CORPORATION** via electronic mail and U.S. Mail upon the following:

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INC., F/K/A The Wackenhut  
Corporation**

## EXHIBIT A

JUNE 25, 2015 DECISION AND ORDER  
Cases 12-CA-026644 and 12-CA-026811

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation and Thomas Frazier and Cecil Mack.** Cases 12-CA-026644 and 12-CA-026811

June 25, 2015

# DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA  
AND HIROZAWA

On September 28, 2012, the Board issued a Decision and Order Remanding in this proceeding, which is reported at 358 NLRB No. 160. On April 30, 2013, the Board issued a Supplemental Decision and Order, which is reported at 359 NLRB No. 101. Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision and Order Remanding and the Supplemental Decision and Order, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 27, 2014, the Board set aside the Decision and Order Remanding and the Supplemental Decision and Order. On August 18, 2014, the court of appeals remanded this case for further proceedings.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision, supplemental decision, and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision and Order Remanding and the Supplemental Decision and Order, and we agree with the rationale set forth therein. Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision and Order Remanding reported at 358 NLRB No. 160 and the Supplemental Decision and Order reported at 359 NLRB No. 101, which we incorporate by reference. The judge's recom-

mended Order, as further modified here, is set forth in full below.<sup>1</sup>

The Respondent suspended and discharged Charging Parties Thomas Frazier and Cecil Mack, both lieutenants in its security force at Florida Power & Light's Turkey Point, Florida nuclear power plant. In agreement with the Respondent, our dissenting colleague argues that the suspensions and discharges were lawful because, in his view, Lieutenants Frazier and Mack are statutory supervisors based on their possession of authority to discipline security officers and their use of independent judgment in exercising that authority. To so conclude, our colleague relies on the testimony of Project Manager Michael Mareth and disciplinary notices issued by lieutenants other than Frazier and Mack. For the reasons that follow, we find this evidence insufficient to demonstrate that Frazier and Mack are statutory supervisors.<sup>2</sup> Rather, they are statutory employees who were suspended and discharged in violation of Section 8(a)(1) of the Act for engaging in protected, concerted activity.<sup>3</sup>

Because the Respondent bears the burden of proving statutory supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish that status. See, e.g., *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict.

<sup>1</sup> We shall modify the judge's recommended remedy and Order in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014). In finding the 8(a)(1) suspension violation for the reasons stated in the Supplemental Decision and Order reported at 359 NLRB No. 101, we do not rely on *Fort Dearborn Co.*, 359 NLRB No. 11 (2012). Instead we rely on *Beverly California Corp.*, 326 NLRB 153, 154 (1998), *enfd.* in relevant part 227 F.3d 817 (7th Cir. 2000). In finding that the discharge of Cecil Mack violated Sec. 8(a)(1), we rely on *Evenflow Transportation, Inc.*, 361 NLRB No. 160 (2014), incorporating by reference 358 NLRB No. 82 (2012), cited in the Supplemental Decision and Order. We do not rely on *Belgrove Post Acute Care Center*, 359 NLRB No. 77 (2013), cited in the Supplemental Decision and Order. In finding that the lieutenants are not statutory supervisors, we do not rely on *Alternate Concepts, Inc.*, 358 NLRB No. 38 (2012), cited in the Decision and Order Remanding. Rather, we rely on the other cases cited in the Decision and Order Remanding and on the cases cited and discussed below.

<sup>2</sup> Because we find Mareth's testimony and the disciplinary notices insufficient to establish the supervisory status of the lieutenants, we need not and do not rely on any portion of Frazier's testimony, much of which the judge discredited. See also fn. 2 of the underlying Decision and Order Remanding. Thus, the dissent is incorrect in asserting that the "picture [we] paint of lieutenants' supervisory authority reflects Frazier's discredited account rather than Mareth's credited testimony."

<sup>3</sup> We address here only the arguments raised by the dissent. With respect to the other issues presented in this case, our findings are based on the rationale set forth in the Decision and Order Remanding and the Supplemental Decision and Order, as stated above.



See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006); *Lynwood Manor*, 350 NLRB 489, 490 (2007); see also *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Similarly, job descriptions, job titles, and similar “paper authority,” without more, do not demonstrate supervisory authority. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (2014); *Golden Crest*, 348 NLRB at 731. And like other statutory indicia of supervisory status, the authority to discipline other employees is not determinative unless it is exercised using independent judgment. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006).

Contrary to our dissenting colleague, Mareth’s testimony is insufficient to carry the Respondent’s burden. As the most senior manager in charge of security at the facility, Mareth is several levels removed from the lieutenants in the Respondent’s hierarchy, and there is no record evidence that he ever served as a lieutenant. Perhaps not surprisingly, Mareth’s testimony consists chiefly of conclusory responses to leading questions by counsel.<sup>4</sup> He did not describe what procedures, protocols, criteria, or other factors, if any, govern lieutenants’ disciplinary actions. See, e.g., *Lynwood Manor*, 350 NLRB at 490. In fact, Mareth did not testify to a single specific instance in which a lieutenant had exercised discretion or independent judgment regarding discipline. See, e.g., *Avante at Wilson*, supra, 348 NLRB at 1057 (rejecting claim of supervisory status absent evidence of specific examples). As the D.C. Circuit stated in *Oil Chemical & Atomic Workers v. NLRB*,<sup>5</sup> “what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.” Mareth’s generalized testimony is plainly insufficient to satisfy this requirement. See also *Golden Crest Healthcare Center*, supra at 731; *Lynwood Manor*, supra at 490.

The eight disciplinary notices admitted into evidence, none of which were issued by Frazier or Mack, are also insufficient under this standard to establish that Frazier and Mack are statutory supervisors. Even assuming that the notices evidence authority to discipline, they do not

show that lieutenants exercised independent judgment when issuing them. To exercise independent judgment, “an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data,” provided that the act involves using a degree of discretion rising above the “merely routine or clerical.” *Oakwood Healthcare*, 348 NLRB at 692–693. Judgment is not independent if it is “dictated or controlled by detailed instructions” such as those “set forth in company policies or rules . . . .” Id. at 693. Here, the disciplinary notices show that whatever authority to discipline the lieutenants may exercise, it is both routine and significantly limited by detailed instructions in the Respondent’s attendance and progressive discipline policies.

All eight disciplinary notices cite specific provisions of the attendance and progressive discipline policies, and those policies mandated the level of discipline that the notices imposed. Seven of the eight notices involve attendance infractions. The Respondent’s attendance policy contains 15 detailed pages of directives regarding absences and the appropriate discipline for specified numbers of absences. The attendance policy operates in tandem with a progressive discipline policy, which consists of 11 pages of defined offenses and specifies 3 escalating levels of discipline consisting of warnings, suspensions, and termination to be imposed for the offenses. Contrary to the dissent, the eight notices do not cover a “range of offenses.” As stated above, all but one notice involve attendance infractions—security officers either being late or not reporting to work or training.<sup>6</sup> Further, these are routine matters that do not involve the exercise of discretion: the security officer either was or was not absent or late for work or training. Little or no independent judgment is needed to make that determination.

The Respondent offered no evidence to the contrary. Indeed, the Respondent failed to call any of the lieuten-

<sup>4</sup> For example:

Q. Do lieutenants have any role in disciplining security officers?

A. Yes, they do.

Q. Do lieutenants have any—exercise any discretion in issuing discipline under this policy?

A. Yeah, they have the ability to do that, yes.

<sup>5</sup> 445 F.2d 237, 243 (D.C. Cir. 1971), cert. denied 404 U.S. 1039 (1972).

<sup>6</sup> The other notice involved a security officer who damaged a security vehicle and was issued a Level II written warning. There is no support for our colleague’s assertion that this discipline “reflect[ed] the issuing lieutenant’s discretionary decision to treat the incident as a Level II violation” rather than a Level I discharge offense. The incident reported in the disciplinary notice—a lift arm at a security gate that hit a parked security vehicle—did not describe conduct or vehicle damage indicative of a Level I discharge offense, which lieutenants could not impose in any event. Rather, the notice specifically stated that the damage caused by the security guard mandated a Level II written warning and, consistent with this requirement, the notice further advised that additional Level II discipline in the form of a written warning and suspension would follow if the same conduct occurred within 12 months. It is apparent, therefore, that Level II was the only level of discipline that the issuing lieutenant considered, or could have considered, for the vehicle damage caused by the security officer, as it is undisputed that lieutenants cannot impose Level I discharges.

## G4S REGULATED SECURITY SOLUTIONS

ants who signed the disciplinary notices to testify that they exercised independent judgment in issuing them or to describe the role the lieutenants played in their issuance to the security officers. For example, there is no indication whether lieutenants exercised discretion in deciding to issue discipline at a certain level and then prepared and signed the disciplinary notices based on that decision, or whether they signed and delivered already-prepared notices at the behest of higher-ranking supervisors. There is some evidence in the record that suggests the latter possibility. One of Frazier's performance evaluations instructed him to consult the progressive discipline policy and to get a captain's review before issuing discipline. Finally, the Respondent's claim that lieutenants have discretion to decide whether to issue or withhold discipline is based solely on March's purely conclusory testimony; there is no testimonial or documentary evidence from any of the lieutenants indicating that they exercised such discretion.<sup>7</sup>

As indicated above, the Board has consistently held that to prove supervisory status by a preponderance of the evidence, a party must present detailed, specific evidence and cannot rely on conclusory testimony or evidence that is inconclusive or otherwise in conflict. See *Golden Crest Healthcare Center*, supra; *Lynwood Manor*, supra; *Avante at Wilson*, supra. Our colleague contends, however, that we have done "violence" to the preponderance of the evidence standard by applying a different "undefined higher-level threshold of proof" in finding that the lieutenants are not 2(11) supervisors. We respectfully disagree. Our decision here is the same as that reached by a unanimous Board panel 10 years ago in *Wackenhut Corp.*, 345 NLRB 850 (2005), involving the same Respondent and the same issue of whether the lieutenants were supervisors. In finding that they were not, the Board cited the same reasons on which we rely today in finding an evidentiary absence of independent judgment in exercising disciplinary authority—disciplinary forms that were signed by lieutenants simply referenced "specific, enumerated regulations . . . [that] mandated the type of discipline to be issued in each particular in-

<sup>7</sup> Contrary to our colleague, the disciplinary notices, which are all typewritten, show only that they were signed, not prepared, by lieutenants. Our colleague asserts, however, that the Respondent was "not required to exclude speculative possibilities" that the notices were not prepared by lieutenants. We disagree. In *Sheraton Universal Hotel*, 350 NLRB 1114, 1116 (2007), which our colleague cites, the Board found that a hotel's front desk supervisor exercised 2(11) authority in recommending discipline, reversing the judge's contrary finding based on his "speculation" that upper management independently investigated the recommendations. See also, *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. 7 (2011) (rejecting as "speculative" manager McCorkle's testimony that dispatchers were supervisors).

stance" and the failure by the Respondent "to call as witnesses any of the lieutenants who signed the forms." Id. at 854.

Although we agree with our colleague that "much has changed since the record in [*Wackenhut I*] was created in 2004," we find that it is not in a way that supports his position. The record evidence in that case, also insufficient to establish supervisory status, was considerably more substantial than the evidence submitted here. It consisted of 25 disciplinary forms and 3 "Daily Fire Watch Rove Field Check" forms signed by lieutenants. All of those forms documented offenses and deficiencies by security officers within the preceding 12 months. Here, by contrast, all except one of the eight disciplinary notices were at least 2 years old.<sup>8</sup> Id. at 866–867.<sup>9</sup>

In sum, based on a careful review of the record, and applying well-established precedent, we find that the Respondent has not met its burden of proving that Frazier and Mack are statutory supervisors. To find otherwise, in the absence of evidence that either of them ever disciplined a security officer in their 7 years as lieutenants, and based on the limited, conclusory, and stale evidence submitted by the Respondent, would-borrowing the dissent's terminology—constitute a "violent" departure from precedent.

## ORDER

The National Labor Relations Board orders that the Respondent, G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation, Miami-Dade County, Florida, its officers, agents, successors, and assigns, shall

<sup>8</sup> Contrary to the dissent, there is no indication in *Wackenhut* that the failure by the Respondent to submit its attendance and progressive disciplinary policies in evidence was a factor in the Board's finding that the lieutenants did not exercise independent judgment.

<sup>9</sup> Our dissenting colleague points to a "Supervisory Requirements" form signed by Frazier and Mack indicating that they had authority to use progressive discipline. But this is "paper authority" of supervisory status and, as stated above, the Board has consistently found that the mere grant of "paper authority," without more, does not establish that an individual is a supervisor. *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2; *Golden Crest*, supra, 348 NLRB at 731. As discussed, there is no "more" here, as the record is devoid of evidence that the lieutenants, in actual practice, exercise independent judgment in disciplining guards.

Further, our dissenting colleague's reliance on *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007), is misplaced. In that case, the individuals found to be supervisors testified that they alone decided whether the misconduct at issue warranted a verbal warning or written documentation. The record here does not establish that the lieutenants exercise similar discretion.

Our colleague also argues that, based on our decision, none of the Respondent's managers could exercise the authority to discipline. We are deciding only this case, however, and doing so based on the record the parties themselves created.

## 1. Cease and desist from

(a) Discharging or suspending employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as modified in this decision.

(c) Compensate Thomas Frazier and Cecil Mack for any adverse tax consequences of receiving their backpay in one lump sum, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

(d) Within 14 days from the date of this Order, remove from its files any reference to the discharges and suspensions, and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Miami-Dade County, Florida facility copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employ-

ees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 2, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 25, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The Respondent provides a military-type security force for Florida Power & Light's Turkey Point nuclear power plant. Charging Parties Thomas Frazier and Cecil Mack were lieutenants in that force, and the Respondent expected them to discipline the security guards under their command. Although Frazier and Mack denied possessing supervisory authority, the judge refused to credit those denials. Contrary to my colleagues, I would affirm the judge's determination that Frazier and Mack possess supervisory authority under Section 2(11) of the Act based on their authority to discipline employees and their authority to exercise independent judgment when imposing discipline. Accordingly, I would dismiss the complaint.<sup>1</sup>

<sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>1</sup> Because the possession of just one 2(11) indicium of supervisory authority establishes statutory supervisory status, I find it unnecessary to reach the other supervisory indicia addressed by the judge: authority to promote, to assign, and responsibly to direct. Additionally, I do not reach the issue of whether, if Frazier and Mack were employees, the Respondent would have acted unlawfully in discharging them.



## G4S REGULATED SECURITY SOLUTIONS

Congress exempted supervisors from the Act based on its judgment that “an employer is entitled to the undivided loyalty of its representatives.” *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). The supervisory exemption is an important part of the national labor policy devised by Congress. *Id.* In my view, the majority’s decision reflects an unduly restrictive treatment of the record evidence and an unduly narrow interpretation of our precedents dealing with supervisory status.

The Act exempts as supervisors those who (1) hold authority to engage in one of the 12 supervisory functions listed in Section 2(11); (2) use independent judgment in their exercise of such authority; and (3) hold that authority “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The burden of establishing supervisory status by a preponderance of the evidence rests on the party asserting it—here, the Respondent. *Id.* Because discipline is one of the powers enumerated in Section 2(11), possession of authority to discipline, in the interest of the Respondent, with independent judgment is sufficient to make Frazier and Mack statutory supervisors.

I believe the evidence in this case reveals that Frazier and Mack possessed authority to discipline and to use independent judgment in exercising that authority.<sup>2</sup> The Respondent’s project manager, Michael Mareth, testified that lieutenants could impose all forms of progressive discipline except termination without advance approval of a captain or other higher-ranking officer. He also explained that lieutenants, on their own, could decide whether to issue discipline or alternatively to let an offense go unpunished or to use the incident as a “coaching” opportunity. Additionally, Mareth testified that where offenses are listed at two different levels of progressive discipline, lieutenants have discretion to impose discipline at either level. Mareth was familiar with the lieutenants’ duties, and only two managerial levels (an operations manager and five captains) separated the lieutenants and Mareth. Mareth had been in charge of security at Turkey Point for 3 years and had worked for the Respondent for 28 years. And his testimony on disciplinary authority was corroborated by Frazier and Mack themselves. Frazier admitted that, as a lieutenant, he “had the authority to issue oral and written warnings” and “to issue discipline at least at certain levels.”<sup>3</sup> Both

he and Mack acknowledged that they had signed a “Supervisory Requirements” document confirming that their job duties included imposing “progressive discipline.” Frazier also conceded that he could have exercised “independent judgment” in issuing discipline, but he never saw the need to issue discipline. No credited testimony contradicts this evidence. Taken as a whole, it was more than enough to establish Frazier and Mack possessed authority to discipline with independent judgment. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007) (authority to issue employee counseling forms evinces 2(11) supervisory status, where disputed individuals had discretion to decide whether to document infraction).<sup>4</sup>

This testimony was corroborated by eight Employee Disciplinary/Corrective Action Notices recording various forms of discipline issued to five bargaining-unit guards by seven different lieutenants. These disciplinary notices covered a range of offenses—tardiness, absenteeism, failure to report to training on time, and damaging a vehicle—and the sanctions imposed ranged from oral warnings and written reprimands to 1-day suspensions. This discipline was issued pursuant to the Respondent’s attendance and progressive discipline policies, which apply to discipline issued by all levels of the Respondent’s management. Those policies furnish guidelines for the level of discipline appropriate to various offenses, but they also recognize that a guard may commit an unlisted offense or that following the guidelines may not be warranted in some instances. Indeed, one offense listed at two progressive-discipline levels—“[f]ailure to meet satisfactory job performance or behavior standards *in the opinion of management*” (emphasis added)—explicitly requires independent judgment. As the Board cautioned in *Oakwood Healthcare*, “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” 348 NLRB at 693. The progressive discipline policy here expressly does so.<sup>5</sup>

admissions that he possessed disciplinary authority, which are consistent with Mareth’s testimony. The picture my colleagues paint of lieutenants’ supervisory authority reflects Frazier’s discredited account rather than Mareth’s credited testimony.

<sup>4</sup> The majority rejects Mareth’s testimony as conclusory and unspecific. I disagree. As shown above, Mareth’s testimony was clear and specific regarding the extent of lieutenants’ authority to discipline and the circumstances under which they could exercise independent judgment. It was also corroborated by Frazier and Mack.

<sup>5</sup> The disciplinary notice issued for damaging a vehicle (i.e., causing damage to property) reflects the issuing lieutenant’s discretionary decision to treat the incident as a Level II violation—“unsatisfactory job performance in the opinion of management”—although the progressive discipline policy also includes the Level I offense of “[n]egligent or careless acts that cause serious personal injury or property damage.”

<sup>2</sup> It is undisputed that if Frazier and Mack had authority to discipline, they exercised that authority in the interest of the Respondent.

<sup>3</sup> As noted above, the judge found that Frazier made an effort to minimize his authority as a lieutenant, and he discredited Frazier’s testimony “where [it was] contradicted by the testimony of others or called into question by documentation.” Accordingly, I have relied on Frazier’s

The majority rejects this evidence, but I believe their reasons do not withstand scrutiny. The majority first contends that the Respondent failed to disprove the possibility that the lieutenants were merely signing documents prepared by higher-ranking supervisors. Yet, the documents indicate on their face that they were prepared and signed by lieutenants. Under the applicable preponderance of the evidence standard, the Respondent was not required to exclude speculative possibilities.<sup>6</sup> The majority next asserts that Frazier was required to get a captain's review before issuing discipline, citing language from one of Frazier's performance evaluations that indicates that *lieutenants* would have prepared the forms. That evaluation states: "Have more involvement with the Security Officers when disciplinary actions need to be issued. Review and use WNS policy 108 [the Respondent's discipline policy] for guidance when issuing any disciplinary actions and have the Captain review the disciplinary [sic] prior to giving it to the Officers." Read in context, this is not an instruction to get a captain's review before issuing discipline, as the majority contends. Rather, it is a criticism of Frazier for being insufficiently involved in the disciplinary process, and a directive to issue discipline as the duties of his position require. Finally, the majority rejects the disciplinary notices because they were prepared by "lieutenants other than Frazier and Mack" and most were "at least 2 years old." Regarding the first point, the disciplinary notices demonstrate that the Respondent's lieutenants possess authority to discipline with independent judgment, and Frazier and Mack are lieutenants. Even if Frazier and Mack refused to exercise the authority they possess, Section 2(11) requires only the possession of authority to carry out an enumerated supervisory function, not its actual exercise. *Sheraton Universal Hotel*, 350 NLRB

This determination was significant because a Level I offense is grounds for immediate discharge under the Respondent's progressive discipline policy. And although the majority discounts discipline for violations of the attendance policy as routine and nondiscretionary, the disciplinary notice issued to a security officer for reporting late to training cited the progressive discipline policy, not the attendance policy. Further, all of the notices on their face constitute discipline. Two of the notices impose suspensions, and all of them state that further infractions could result in more severe discipline, consistent with the Respondent's policies. Because the lieutenants thus had considerably more than "paper authority" to discipline, *Lucky Cab Co.*, 360 NLRB No. 43 (2014), cited by the majority, a case where the employer did not even have a progressive disciplinary procedure, is clearly distinguishable.

<sup>6</sup> Disputing that the Respondent was not required to exclude the speculative possibility that lieutenants merely signed disciplinary notices, my colleagues cite *Sheraton Universal Hotel*, 350 NLRB 1114 (2007), and *Entergy Mississippi, Inc.*, 357 NLRB No. 178 (2011). But as their own description of those cases shows, the Board there rejected findings based on speculation. Those cases support my point, which is that the majority similarly relies on speculation here.

1114, 1118 (2007) (finding that front desk supervisor (FDS) possessed authority to make effective recommendations with regard to hiring where manager testified he would not hire an applicant if FDS recommended against it, despite no specific examples of FDS making such recommendations). Regarding the second point, the date of the disciplinary notices does not diminish their probative value absent evidence that the lieutenants' duties have changed in the interim. There is no such evidence here.

The broad reach of the Respondent's disciplinary policies further supports a finding that Frazier and Mack were supervisors. As noted above, the progressive discipline and attendance policies apply to disciplinary decisions by *all* levels of the Respondent's management, from lieutenants on up. If those policies preclude independent judgment, then the Respondent (and many other employers with similar policies) would have *no* statutory supervisors possessed of 2(11) disciplinary authority. My colleagues' response—i.e., that they are "deciding only this case . . . based on the record the parties themselves created"—improperly discounts this issue. It is unreasonable to adopt the rationale embraced by my colleagues, under which *nobody* in the Respondent's management ranks exercises independent judgment in issuing discipline.

Section 10(c) of the Act expressly requires the Board to accept facts that are proven by a "preponderance of the evidence." "The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 622 (1993) (internal quotations omitted). As shown above, the evidence that Frazier and Mack possessed 2(11) authority to discipline with independent judgment clearly meets the preponderance standard. It does violence to this standard, in my opinion, to disregard relevant evidence merely because the majority believes the Respondent should have introduced yet more evidence. Although my colleagues purport to apply the preponderance standard, they actually apply an undefined, higher-level threshold of proof. The Supreme Court has criticized the Board for applying an effective standard different from its announced standard as a breach of its duty to engage in reasoned decisionmaking. *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 372–377 (1998). I believe the majority does that very thing here.

The heightened standard of proof applied by the majority is especially unwarranted in the circumstances of this case. There can be no reasonable doubt that the Respondent expected its lieutenants to discipline security

## G4S REGULATED SECURITY SOLUTIONS

officers. Indeed, the record evidence reveals the Respondent's unsuccessful efforts to get Frazier and Mack to perform that duty. By holding against the Respondent Frazier and Mack's refusal to do so, in defiance of the Respondent's clear and repeated instructions, the majority hamstringing employers faced with supervisors who refuse to supervise.

In *Wackenhut Corp.*, 345 NLRB 850, 855 (2005), the Board found the Respondent did not establish that certain Turkey Point lieutenants possessed authority to discipline. However, much has changed since the record in that case was created in 2004. In 2006, the lieutenants signed the "Supervisory Requirements" document described above, confirming their authority to impose progressive discipline. Additionally, the Board found that the lieutenants at issue in the earlier case were not shown to have exercised independent judgment in issuing discipline in large part because lieutenant-signed discipline documents all cited "specific, enumerated regulations." Although the regulations were not in the record, the Board found that "it is clear from the context of the forms that the regulations mandated the type of discipline to be issued in each particular instance." 345 NLRB at 854. The lieutenant-issued Employee Discipline/Corrective Action Notices here, however, refer to either the progressive discipline policy or absenteeism policy. Those policies *are* in this record and, as discussed above, they are not so detailed as to eliminate discretion. In these respects, among others, independent judgment was established on the record in this case.

Finally, lieutenants are paid more than security guards, receive additional training not given to guards, are included in management meetings that guards do not attend, and perform little actual guard work. The Board has regarded such evidence as persuasive "secondary indicia" of supervisory status. See, e.g., *American River Transportation Co.*, 347 NLRB 925, 927 (2006) (higher pay and better benefits); *Burns Security Services*, 278 NLRB 565, 570 (1986) (sergeants and lieutenants attended monthly management meetings). Additionally, Frazier and Mack were viewed as supervisors.<sup>7</sup> And if the lieutenants were not supervisors, each captain would be responsible for supervising more than 30 security guards—an implausibly large number given the size, complexity and security sensitivity of the Turkey Point site. See, e.g., *Burns Security Services*, supra at 571 (finding lieu-

tenants and sergeants to be statutory supervisors with 2 to 1 guard-to-supervisor ratio at nuclear power plant).

For these reasons, I believe the Respondent has shown by a preponderance of the evidence that Frazier and Mack possessed authority to discipline security guards and to exercise independent judgment in doing so. Accordingly, I respectfully dissent.

Dated, Washington, D.C. June 25, 2015

Philip A. Miscimarra,

Member

## NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

## POSTED BY ORDER OF THE

## NATIONAL LABOR RELATIONS BOARD

## An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or suspend any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits resulting from their suspension and discharge, less any net interim earnings, plus interest.

WE WILL compensate Thomas Frazier and Cecil Mack for any adverse tax consequences of receiving their backpay in one lump sum, and WE WILL file reports with the Social Security Administration allocating the

<sup>7</sup> As Frazier conceded, the Respondent treated them as supervisors, and Timothy Lambert, who had been the Union's president since May 2009 and a Turkey Point guard for over 10 years, stated that Frazier and Mack "were supervisors." Lambert further testified that a lieutenant would be his "first line of reporting" and "first line of supervision."

backpay awards to the appropriate calendar quarters for each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges and suspensions of Thomas Frazier and Cecil Mack, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

G4S REGULATED SECURITY SOLUTIONS, A  
DIVISION OF G4S SECURE SOLUTIONS (USA)  
INC. F/K/A THE WACKENHUT CORPORATION

below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



The Board's decision can be found at [www.nlr.gov/case/12-CA-026644](http://www.nlr.gov/case/12-CA-026644) or by using the QR code

## EXHIBIT B

SEPTEMBER 28, 2012 DECISION AND ORDER  
Cases 12-CA-026644 and 12-CA-026811



*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a the Wackenhut Corporation and Thomas Frazier and Cecil Mack. Cases 12-CA-026644 and 12-CA-026811**

September 28, 2012

**DECISION AND ORDER REMANDING**

**BY CHAIRMAN PEARCE AND MEMBERS HAYES  
AND BLOCK**

On June 27, 2011, Administrative Law Judge William N. Cates issued the attached decision. The Acting General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Acting General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order Remanding.

The Respondent discharged Charging Parties Thomas Frazier and Cecil Mack, both lieutenants in its security force at Florida Power & Light's Turkey Point, Florida nuclear power plant. The Respondent contends in this case that Lieutenants Frazier and Mack are statutory supervisors who possess the authority to discipline, to promote (through evaluations), to assign, and responsibly to direct. Agreeing with each of these contentions, the judge concluded that the Respondent did not violate the Act by discharging them. For the reasons stated below,<sup>1</sup> we find that Frazier and Mack are statutory employees protected by the Act. Accordingly, we reverse the judge and remand the case to him to determine whether their dis-

<sup>1</sup> In 2003, the Board certified the International Union, Security, Police and Fire Professionals of America as the representative of a unit of Turkey Point sergeants. Shortly thereafter, the Respondent unilaterally eliminated the newly represented sergeant classification and transferred some of the work performed by that bargaining unit to nonunit lieutenants. The Board found that these actions violated Sec. 8(a)(5) and (1) in *Wackenhut Corp.*, 345 NLRB 850 (2005). The Board held that the newly created lieutenants to whom the Respondent had transferred the unit work were not statutory supervisors, specifically rejecting the Respondent's claim that they disciplined, or directed the work of, the guards with the requisite independent judgment. To the extent that the Acting General Counsel argues that the Board is bound by this earlier decision, we need not pass on that argument because we find that the Respondent has failed to carry its burden of proving supervisory status based on the record in the present case.

charges violated Section 8(a)(1) of the Act as alleged in the complaint.

**I. ANALYSIS**

**A. Applicable Principles**

Section 2(11) of the Act defines a "supervisor" as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To establish that Frazier and Mack are supervisors, the Respondent must prove by a preponderance of the evidence: (1) that they held authority to engage in any one of the 12 enumerated supervisory functions listed above; (2) that their "exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment"; and (3) that their authority was held "in the interest of the employer." See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Respondent can prove that they had the requisite supervisory authority either by demonstrating that they actually performed a supervisory action or by showing that they effectively recommended that it be done. *Oakwood*, above. Further, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Id.* at 692-693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* at 693.

Because the Respondent bears the burden of proving supervisory status, the Board must hold against the Respondent any lack of evidence on an element necessary to establish supervisory status. See, e.g., *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1048 (2003). The Respondent has not proven supervisory status where the record evidence is inconclusive or otherwise in conflict. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Likewise, "mere inferences or conclusory statements, without detailed, specific evidence, are insufficient to establish supervisory authority." *Altinate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012); see also *Avante at Wilson, Inc.*, 348 NLRB 1056,

1057 (2006); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Also, job descriptions, job titles and similar “paper authority,” without more, do not demonstrate actual supervisory authority. *Golden Crest*, supra.

Applying these principles here, we find that the evidence in this case falls well short of meeting the Respondent’s burden of proving that the lieutenants possess any indicia of supervisory authority.

#### B. Authority to Discipline

Based on Project Manager Michael Mareth’s testimony, the judge found that lieutenants can issue any type of discipline, except termination, without consulting a supervisor.<sup>2</sup> The judge further found, based on Mareth’s testimony, that lieutenants had certain discretion when issuing discipline. For instance, they can decide not to issue formal discipline or can choose, for certain infractions, which level of discipline to issue. The judge also observed that the Respondent introduced eight disciplinary notices issued by lieutenants. The judge acknowledged that none of the eight disciplinary citations was issued by Frazier or Mack, and that there is no evidence that either Frazier or Mack ever disciplined a security officer in their approximately 7 years as lieutenants. In addition, none of the lieutenants who signed the disciplinary forms testified. Nevertheless, the judge concluded that the lieutenants exercised the authority to discipline with independent judgment. For the following reasons, we disagree.

We find that Mareth’s testimony is insufficient to carry the Respondent’s burden. Mareth, as the most senior manager in charge of security at the facility, is several levels removed from the lieutenants in the Respondent’s hierarchy. And there is no record evidence that he ever served as a lieutenant. Perhaps not surprisingly, Mareth’s testimony consists chiefly of conclusory responses to leading questions by counsel.<sup>3</sup> Mareth did not describe what procedures, protocols, criteria, or other factors govern lieutenants’ decisions in this area. See, e.g.,

*Lymwood Manor*, 350 NLRB 489, 490 (2007). In fact, Mareth did not testify to a single specific instance in which a lieutenant had used discretion or independent judgment regarding discipline. See, e.g., *Avante at Wilson, Inc.*, supra, 348 NLRB at 1057 (rejecting claim of supervisory status absent testimony on specific examples). Such generalized testimony is insufficient to establish supervisory status. See *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3. Accord: *Oil, Chemical & Atomic Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) (“[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.”), cert. denied 404 U.S. 1039 (1972).

Contrary to the judge, we find that the eight disciplinary notices admitted into evidence do not shed any additional light on the lieutenants’ disciplinary authority. The notices refer to, and were issued pursuant to, the Respondent’s attendance and progressive discipline policies, which spell out in detail the level of discipline to be imposed for various offenses.<sup>4</sup> Moreover, there is simply no detailed, specific evidence in the record as to what role the lieutenants who signed those notices played in making the decision to discipline the security officers. Such evidence could have been provided by the lieutenants themselves, but the Respondent failed to call any of them to testify. Thus, the record does not establish, for example, whether lieutenants themselves decided to discipline an employee at a certain level and then prepared and signed the disciplinary notices based on that decision, or whether they simply signed and delivered already-prepared notices at the behest of higher-ranking supervisors. In fact, there is some evidence in the record that suggests the latter possibility. One of Frazier’s performance evaluations explicitly instructed him to consult the detailed corporate progressive discipline policy and to get a captain’s review before issuing discipline.<sup>5</sup>

<sup>4</sup> The attendance policy contains 15 detailed pages of directives regarding absences and the appropriate discipline for various numbers of absences. The progressive discipline policy consists of 11 pages of equally detailed guidelines covering a wide array of other offenses.

<sup>5</sup> As our dissenting colleague observes, some infractions could be punished at different levels, the unsatisfactory performance provision of the discipline policy allows for some discretion “in the opinion of management,” and the policies are characterized as “guidelines.” He also points to the “Supervisory Requirements” document signed by Frazier and Mack indicating they had the authority to use progressive discipline. But such “paper authority,” without more, is insufficient. See, e.g., *Golden Crest*, supra. And, as discussed, there is no “more” here, as the record is devoid of evidence that the lieutenants, in actual practice, exercise independent judgment in disciplining guards.

Further, our dissenting colleague’s reliance on *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007), is misplaced. In that case, the putative supervisors testified, and the Board majority found, that

<sup>2</sup> The judge generally credited Mareth and discredited Frazier where the latter’s testimony was contradicted by others or called into question by documentation. Mack’s testimony was less extensive than Frazier’s but, in all important respects, was consistent with it. Consequently, in rejecting Frazier’s testimony as he did, the judge implicitly discredited Mack’s like testimony as well. See, e.g., *Miceli & Oldfield, Inc.*, 357 NLRB No. 49, slip op. at 1 fn. 2 (2011) (decision as a whole shows judge discredited charging party). No party has excepted to the judge’s credibility findings. Accordingly, we do not rely on those portions of Frazier’s or Mack’s testimony that the judge discredited.

<sup>3</sup> For example: “Q. Do lieutenants have any role in disciplining security officers? A. Yes, they do.” “Q. Do lieutenants have any—exercise any discretion in issuing discipline under this policy? A. Yeah, they have the ability to do that, yes.”

### C. Authority to Promote (Through Evaluations)

The judge found that only lieutenants regularly prepare written evaluations of security officers and that the Respondent utilized these evaluations in its promotion policy. Specifically, the Respondent's promotion policy prescribed a five-stage process leading to promotion: (1) a written examination; (2) oral questions and an interview by a multimember promotion board; (3) review of performance appraisals, attendance records, achievements, and discipline history; (4) review of educational background; and (5) promotion board review of candidates and selection of a finalist, whose promotion required the concurrence of the project manager. The judge further found based on Mareth's testimony that, under this policy, at least four unnamed security officers had their promotions "impacted" by their lieutenant's evaluations. He observed that Frazier acknowledged that a bad evaluation could impact a security officer's promotion possibilities. Based on this evidence, the judge concluded that the lieutenants independently performed evaluations of their direct subordinates that led to promotions and, by so doing, exercised the power to promote. For the reasons stated below, we disagree.

Evaluating employees is not one of the 12 supervisory functions listed in Section 2(11). Authority to "promote" is. To tie the lieutenants' evaluations of the guards to Section 2(11) authority, the Respondent was required to establish that lieutenants' evaluations affected guards' promotion prospects. In other words, under Board law, an evaluation is evidence of supervisory status only if the evaluation, by itself, affects an employment term or condition. See *Pacific Coast M.S. Industries*, 355 NLRB 1422, 1423 fn. 13 (2010); *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999); *Northcrest Nursing Home*, 313 NLRB 491, 498 (1993). The judge failed to acknowledge or apply this standard.

Applying that standard, we find that the evidence in this record does not establish that a lieutenant's evaluation, by itself, affects a guard's promotion. It is undisputed that consideration of evaluations was only one step in a multi-layered formal promotion procedure. That procedure did not attach any particular weight or significance to evaluations. Instead, they were just one piece of

they alone decided whether the misconduct at issue warranted a verbal warning or written documentation. The record here does not establish that the lieutenants exercise similar discretion.

Our dissenting colleague also argues that our decision today is out of step with other decisions finding that individuals with similar job titles at other nuclear facilities are supervisors. He likewise charges that, based on our decision, none of the Respondent's managers could exercise the authority to discipline. We are deciding only this case, however, and doing so based on the record the parties themselves created.

data that had to be assessed in the third step of the promotion board's review of candidates. Mareth did testify that, in accordance with the promotion procedures, evaluations had been "considered" and, in a few cases, had an "impact" on guard promotions. But the Respondent failed to clarify this generalized testimony. Similarly, Frazier's testimony, under cross-examination by the Respondent's counsel, that a guard who repeatedly received poor evaluations "might not" be promoted amounts to little more than speculation on his part. Accordingly, we find that the Respondent has failed to carry its burden to prove that a lieutenant's evaluation, by itself, affects a security guard's promotion.<sup>6</sup>

### D. Authority to Assign

The judge also found that the lieutenants were supervisors based on their alleged authority to make assignments. Again, we disagree. It is undisputed that captains, not lieutenants, assigned guards to posts at the start of shifts. Mareth testified, without elaboration, that lieutenants could allow guards to switch such assigned posts for reasons of personal preference or for "operational reasons." Frazier testified that lieutenants could approve post switches without a captain's approval. The judge simply stated, with no supporting analysis, that this was sufficient to establish the use of independent judgment in assigning the guards.

Contrary to the judge, Mareth's and Frazier's sparse testimony does not establish that lieutenants exercised independent judgment in the assignment of unit guards. The Section 2(11) authority to "assign" refers to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving an employee significant overall duties, i.e., tasks. See, e.g., *Oakwood Healthcare*, supra, 348 NLRB at 689. Even assuming that it has shown something akin to Section 2(11) assignment authority, the Respondent presented no evidence at all that lieutenants used the requisite "independent judgment" in connection with those assignments. The lieutenants' ability to allow post switches for personal reasons is clearly insufficient. See *Children's Farm Home*, 324 NLRB 61, 64 (1997) (schedule changes based on employees' expressed preferences do not demonstrate "independent judgment" to assign). Moreover, Mareth's testimony about post switches for "operational

<sup>6</sup> Given our finding, we need not determine whether lieutenants exercise independent judgment in evaluating security officers.

The Respondent's reliance on *Bayou Manor Health Center*, 311 NLRB 955 (1993), and *Entergy Systems & Service*, 328 NLRB 902 (1999), is misplaced because the evaluations prepared by alleged supervisors in those cases did directly affect employees' promotions or wage increases.



reasons" was, like much of his testimony, purely conclusory. He gave no explanation, details, or specifics about what a switch for "operational reasons" might entail. Similarly, although the lieutenants could assign guards to work locations to respond to emergencies, and one could imagine that making such assignments would require independent judgment,<sup>7</sup> Mareth's testimony in this area was wholly conclusory, lacking any specific examples or details of how lieutenants actually handled emergencies. See, e.g., *Alternate Concepts*, supra, 358 NLRB No. 38, slip op. at 3 (detailed, specific evidence needed to show supervisory authority).

#### *E. Authority Responsibly to Direct*

Last, we cannot accept the judge's finding that the Respondent established that lieutenants responsibly directed guards. In support of this argument, Mareth testified that substandard guard performance could lead to discipline of a lieutenant and that poor quality work by the guards whom a lieutenant supervised could adversely affect the lieutenant's promotion chances. In addition, the Respondent introduced documentary exhibits recording a few instances in which lieutenants were counseled for not properly training their subordinates. Despite the lack of any specific instances in which a lieutenant had in fact been disciplined for a subordinate's failings, the judge found that this evidence demonstrated supervisory authority.

Under *Oakwood Healthcare*, showing that a putative supervisor possesses authority "responsibly to direct" employees requires evidence that the asserted supervisor is "accountable" for subordinates' performance. 348 NLRB at 691-692. Among other elements of proof, it must be shown that "there is a prospect of adverse consequences for the putative supervisor" if he or she does not properly direct work and take necessary corrective action. *Id.* at 692.

Mareth's rote and conclusory testimony on lieutenant accountability fell well short of that standard. He stated that, hypothetically, lieutenants could suffer negative consequences from poor subordinate performance. He did not relate, however, any specific instances in which lieutenants had been disciplined or had their promotion chances reduced as a result of poor guard performance. See, e.g., *Lynwood Manor*, supra, 350 NLRB at 490-491 (no supervisory status absent evidence of specific instances of accountability). The Respondent's exhibits on accountability all were warnings in which lieutenants were counseled for their own mistakes in training guards, not for the failings of the subordinates themselves. Such evidence, as a matter of law, does not show the requisite

accountability. See, e.g., *Entergy Mississippi, Inc.*, 357 NLRB No. 178, slip op. at 6 (2011) (rejecting "responsibly to direct" argument where putative supervisor was disciplined based on his own failings).<sup>8</sup>

#### II. CONCLUSION

We conclude that the Respondent has failed to carry its burden to prove that the lieutenants at issue were supervisors within the meaning of Section 2(11) of the Act. We therefore reverse the judge's dismissal of the complaint. We shall remand the case for appropriate credibility resolutions, findings of fact, and conclusions of law on the merits of the complaint allegations that the Respondent violated Section 8(a)(1) by discharging Frazier and Mack because they engaged in protected, concerted activities.

#### ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge William N. Cates for further appropriate action as set forth above.

IT IS FURTHER ORDERED that based on the existing record, the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order regarding solely the Section 8(a)(1) discharge allegations. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 28, 2012

Mark Gaston Pearce,

Chairman

Sharon Block,

Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, dissenting.

The Board has previously recognized that lieutenants overseeing nuclear power plant security are statutory

<sup>7</sup> Frazier assumed as much in his testimony.

<sup>8</sup> The Respondent contends that various secondary indicia support a finding of supervisory authority a position the dissent also advances. But Board law is clear that, without sufficient proof of Sec. 2(11) primary indicia, secondary indicia do not establish supervisory authority. See, e.g., *Pacific Coast M.S. Industries*, supra, 355 NLRB at 1423 fn. 13. And, as demonstrated above, the Respondent's conclusory, unspecific proof of primary indicia was wholly inadequate.

supervisors.<sup>1</sup> As first-line supervisors in a military-type security force charged with protecting these plants, they must have the authority to issue orders and to discipline subordinates who fail to carry them out. *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 357 (1st Cir. 1980) (stating that it is “desirable and perhaps often essential that someone be in charge to call the shots.”). In this case, the Respondent plainly expected Charging Parties Thomas Frazier and Cecil Mack, as lieutenants in its security force at the Turkey Point, Florida nuclear power plant, to exercise that authority. Frazier and Mack just as plainly did not do so and even denied possessing that authority – denials the judge refused to credit. Contrary to my colleagues, I would affirm the judge’s determination that Frazier and Mack possess Section 2(11) supervisory authority to discipline employees and his resulting recommendation that the complaint, alleging that their discharges were unlawful, be dismissed.<sup>2</sup>

Frazier and Mack were Section 2(11) supervisors if (1) they held authority to engage in one of the 12 supervisory functions listed in that provision; (2) their “exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment;” and (3) their authority was held “in the interest of the employer.” See, e.g., *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). Because discipline is one of the powers enumerated in Section 2(11), holding (in the interest of the Respondent) the authority to discipline with independent judgment was, by itself, enough to make Frazier and Mack statutory supervisors.

Along with 13 other guards, Frazier and Mack were promoted from the bargaining unit to lieutenant in 2003. The Respondent’s project manager, Michael Mareth, testified that lieutenants could impose all forms of progressive discipline, except termination, without advance

approval of a captain or other higher-ranking officer. He also explained that lieutenants, on their own, could decide whether or not to issue discipline, to let an offense go unpunished, or to use the incident as a “coaching” opportunity. Additionally, Mareth testified that, where offenses were listed at two levels of progressive discipline, lieutenants had discretion to impose discipline at either level. This credited testimony established all elements of Frazier’s and Mack’s Section 2(11) disciplinary authority, including independent judgment. See *Oak Park Nursing Care Center*, 351 NLRB 27, 28–29 (2007) (authority to issue employee counseling forms evinces Section 2(11) supervisory status, where disputed individuals had discretion to decide whether to document infraction).<sup>3</sup>

The majority, however, rejects Mareth’s testimony as too conclusory and unspecific. I do not. As shown above, Mareth’s testimony was clear and specific regarding the extent of lieutenants’ authority to discipline and the circumstances under which they could exercise statutory “independent judgment.” Further, Mareth’s testimony has ample support from other quarters. Frazier admitted that, as a lieutenant, he “had the authority to issue oral and written warnings” and that he “had the authority to issue discipline at least at certain levels.” Both he and Mack acknowledged that they had signed a “Supervisory Requirements” document confirming that their job duties included imposing “progressive discipline.” Frazier also conceded that he could have exercised disciplinary “independent judgment,” but he never saw the need to issue discipline. This was more than enough to establish the authority to discipline with independent judgment. See, e.g., *Oak Park Nursing Center*, supra, 351 NLRB at 29.<sup>4</sup>

In addition, the Respondent presented eight Employee Disciplinary/Corrective Action Notices recording various

<sup>1</sup> *Burns Security Services*, 278 NLRB 565 (1986) (lieutenants and sergeants at the Connecticut Yankee nuclear power plant were statutory supervisors). While not binding on the Board, several Regional Director decisions reach the same conclusion. See *Pinkerton Government Services*, Case 10-RC-015511 (May 2, 2005) (sergeants at the Watts Bar, Tennessee nuclear power plant were statutory supervisors); *Fluor Hanford, Inc.*, Case 19-RC-015019 (November 6, 2007) (lieutenants working for a private contractor at a Department of Energy nuclear site were statutory supervisors); *G4S Regulated Security Solutions*, Case 01-RC-064709 (October 25, 2011) (sergeants at the Seabrook, New Hampshire nuclear site were Sec. 2(11) supervisors based on their authority to issue oral counselings and written warnings under a progressive disciplinary system).

<sup>2</sup> I find it unnecessary, therefore, to pass on the majority’s reversal of the judge on the other three supervisory indicia at issue here—the authority to promote (through performance evaluations), to assign, and responsibly to direct.

<sup>3</sup> Although the judge credited Mareth’s testimony, the majority nevertheless disregards it on the theory that, as the senior Turkey Point security manager, he was too far removed from the lieutenants to provide sufficient testimony as to their disciplinary authority. The record shows otherwise. Only two managerial levels (an operations manager and five captains) separated the lieutenants and Mareth, who had been “in charge” of Turkey Point security for three years and had worked for the Respondent for 28 years. Mareth testified at length regarding the position and duties of the lieutenants and his testimony on disciplinary authority was corroborated by Frazier and Mack themselves and by discipline notices drafted by other lieutenants. The judge relied on Mareth’s testimony in these circumstances, and so would I.

<sup>4</sup> As noted above, the judge found that Frazier made an effort to minimize his authority as a lieutenant, and discredited his testimony “where [it was] contradicted by the testimony of others or called into question by documentation.” Consistent with this ruling, I have relied on Frazier’s admissions to possessing supervisory authority that are consistent with Mareth’s testimony.

forms of discipline by various lieutenants. These disciplinary notices covered a wide range of offenses—tardiness, absenteeism, training failure, and the inherently discretionary “unsatisfactory performance in the opinion of management.” Seven different lieutenants imposed discipline on five bargaining-unit guards, and the level II and III sanctions included oral warnings, written reprimands, and 1-day suspensions. Thus, the Charging Parties themselves and unchallenged documents supplied first-hand corroboration of Mareth’s testimony.

My colleagues dismiss this evidence on the basis that the Respondent’s progressive discipline policy was so inflexible that lieutenants could not exercise disciplinary independent judgment. This misconstrues the record. The progressive discipline policy expressly states that its three levels of offenses “are only guidelines.” It also recognizes that there may be instances in which a guard could commit an unlisted offense or in which following the guidelines would not be practical. There is an offense listed at two levels— “[f]ailure to meet satisfactory job performance or behavior standards *in the opinion of management*”—that explicitly requires supervisory judgment (emphasis added). And, as the Board cautioned in *Oakwood Healthcare*, “the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices.” 348 NLRB at 693. The progressive discipline policy here expressly does so.<sup>5</sup>

Concededly, the Board found that the Respondent did not establish that certain Turkey Point lieutenants possessed Section 2(11) supervisory authority to discipline in *Wackenhut Corp.*, 345 NLRB 850, 855 (2005). But much has changed since the *Wackenhut* record was compiled in 2004. Lieutenants personally signed the “Supervisory Requirements” document described above in 2006, confirming their authority to impose progressive discipline. Additionally, the Board in *Wackenhut* found that the lieutenants at issue there did not use independent judgment in issuing discipline in large part because lieutenant-signed discipline documents all cited “specific, enumerated regulations” that were not in the record in that case. 345 NLRB at 854. The lieutenant-issued employee discipline/corrective action notices here, however, refer to either the progressive discipline policy or absenteeism policy. Those policies *are* in this record and, as

discussed above, they are not so detailed as to eliminate lieutenant discretion. As such, independent judgment was established on the record in this case.

Finally, lieutenants are paid more than security guards, receive additional training not given to guards, are included in management meetings that guards did not attend, and perform little actual guard work. The Board has regarded such evidence as persuasive “secondary indicia” of supervisory status. See, e.g., *American River Transportation Co.*, 347 NLRB 925, 927 (2006) (higher pay and better benefits); *Burns Security*, supra, 278 NLRB at 570 (sergeants and lieutenants attended monthly management meetings). Additionally, all Turkey Point security constituencies viewed Frazier and Mack as supervisors.<sup>6</sup> And if the lieutenants were not supervisors, each captain would be responsible for supervising over 30 security guards—an implausibly large number given the size, complexity and security sensitivity of the Turkey Point site. See, e.g., *Burns Security*, supra, 278 NLRB at 571 (finding lieutenants and sergeants to be statutory supervisors with 2 to 1 guard-to-supervisor ratio at nuclear power plant).

Under the preponderance of the evidence standard, the Respondent established all elements of the lieutenants’ Section 2(11) disciplinary authority. In finding otherwise, the majority effectively imposes a higher standard of proof on employers than is appropriate. My colleagues also deprive the Respondent of its established right to the undivided loyalty of those who command its security force in securing the Turkey Point nuclear power plant and responding to emergencies of any kind. Because this step is not justified by precedent or the facts of this case, I respectfully dissent.

Dated, Washington, D.C. September 28, 2012

Brian E. Hayes,

Member

NATIONAL LABOR RELATIONS BOARD

Shelley Plass, Esq., for the Acting General Counsel.<sup>1</sup>  
Fred Seleman, Esq., for the Respondent.<sup>2</sup>

<sup>5</sup> The progressive discipline and attendance policies also apply to disciplinary decisions by all levels of the Respondent’s management, from lieutenants on up. If those policies preclude independent judgment, the Respondent (and many other employers with like policies) would have no statutory supervisors possessed of Sec. 2(11) disciplinary authority.

<sup>6</sup> The Respondent itself, as Frazier conceded, treated them as supervisors. Frazier and Mack likewise viewed themselves as supervisors. And Timothy Lambert, who had been the union president since May 2009 and a Turkey Point guard for over 10 years, stated that Frazier and Mack “were supervisors.” Lambert further testified that a lieutenant would be his “first line of reporting” and “first line of supervision.”

<sup>1</sup> I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.



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## DECISION

## STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. These are two discharge cases I heard in Miami, Florida, commencing on April 4, 2011. The cases originate from a charge filed by Thomas Frazier, an individual (Frazier), on February 22, 2010, in Case 12-CA-26644 and filed by Cecil Mack, an individual (Mack) on July 29, 2010, in Case 12-CA-26811, against G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc. f/k/a The Wackenhut Corporation (Company). The prosecution of these cases was formalized on December 29, 2010, when the Regional Director for Region 12 of the National Labor Relations Board (the Board), acting in the name of the Board's Acting General Counsel, issued a complaint and notice of hearing (complaint) against the Company.

It is specifically alleged the Company, on or about February 2, 2010, indefinitely suspended its employee Mack and thereafter on February 15, 2010, discharged him; and, on or about February 12, 2010, indefinitely suspended its employee Frazier and thereafter on or about February 15, 2010, discharged him because the two engaged in protected concerted activities and to discourage employees from engaging in these or other concerted activities. It is alleged the Company's actions violate Section 8(a)(1) of the National Labor Relations Act (the Act).

The Company, in a timely filed answer to the complaint, denied having violated the Act in any manner alleged in the complaint. The Company, as one affirmative defense, asserts Mack and Frazier were supervisors of the Company within the meaning of Section 2(11) of the Act and thus not protected by the Act.

The parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations in making credibility determinations herein. I have studied the whole record, the posttrial briefs, and the authorities cited therein. Based on the detailed findings and analysis below, I conclude and find, that at all times material herein, Frazier and Mack served as supervisors of the Company within the meaning of the Act and outside the Act's protection. I find the Company did not violate the Act when it suspended and thereafter discharged Frazier and Mack.

## Findings of Fact

## I. JURISDICTION, LABOR ORGANIZATION STATUS, AND SUPERVISORY/AGENCY STATUS

The Company is a Delaware corporation engaged in the business of providing guard and security services to clients throughout the United States, including the Florida Power & Light Company's power plant located at Turkey Point in Miami-Dade County, Florida (Turkey Point), and other facilities located in the State of Florida. During the 12-month period ending December 29, 2010, a representative period, the Company purchased and received at Turkey Point, and at its other

facilities located in the State of Florida, goods and services valued in excess of \$50,000 directly from points outside the State of Florida. The evidence establishes, the parties admit, and I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The parties admit, and I find, International Union, Security, Police and Fire Professionals of America (SPFPA) (Union) is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

It is admitted Security Shift Supervisor Quentin Ferrer, Leadership Development Coordinator Karen Bower Macdonald, Project Manager Michael Mareth, Security Shift Supervisor Gonzalo Pedroso, and Operations Manager Juan Rodriguez are supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.

The first, fundamental and controlling issue is whether security lieutenants Frazier and Mack, at material times herein, were supervisors for the Company within the meaning of Section 2(11) of the Act. If they were supervisors they would not be protected by the Act and the Company's suspending and discharging them would not violate the Act. In as much as I find the two to be supervisors the remaining issues need not be addressed, namely, whether Frazier and Mack engaged in concerted activities protected by the Act and whether they were discharged for doing so. Nor is it necessary to address the Company's affirmative defense that Frazier and Mack were discharged for valid considerations not based on unlawful motives or considerations.

## II. ALLEGED UNFAIR LABOR PRACTICES

## A. Facts

## 1. Background

The Company provides guard and security services for Florida Power & Light at its Turkey Point (Miami/Dade County, Florida) nuclear generating stations. The Company provides its services pursuant to a written agreement with Florida Light & Power and provides its services supportive of, and in compliance with, site security programs which in turn are in compliance with Nuclear Regulatory Commission requirements, specifically Title 10, Code of Federal Regulations 73.55. Florida Power & Light owns several thousand acres at its Turkey Point Nuclear Power Plant facility for which various levels of security are furnished by the Company. Included in Florida Power & Light's Turkey Point property is an area referred to as the "owner controlled area" which contains security fences and intrusion detection devices. Within the protected area is a vital area which contains the power block where the generating stations are that actually produce electrical power. The security provided in all areas includes, as applicable, patrols, duty stations, and other personnel in various capacities. The Company has provided its services at Turkey Point for approximately 27 years and the Company's current contract with Florida Power & Light expires December 31, 2011.

The Company's current name came into effect in 2009, however, prior to that date it, for an extended time, operated as The Wackenhut Corporation. According to Project Manager Mareth, the Company's contract with Florida Power & Light sets

<sup>2</sup> I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

forth a description of the type of security services the Company is to perform. The agreement also sets forth the general staffing requirements and establishes procedures to amend the agreement if it is necessary to change the staffing requirements. Project Manager Mareth stated that generally the security officers performing security services at Turkey Point do not change if the contract is awarded to a different security company. It appears the staffing provisions in the agreement between Florida Power & Light and the Company have remained the same.

The Board in *Wackenhut Corp.*, 345 NLRB 850 (2005), sets forth a somewhat detailed history of labor relations between the Union and Company herein. A "brief" review of that history, taken from that Board case, without further referencing that case, is perhaps helpful. Prior to September 1, 2003, the Company employed four categories of employees at its Turkey Point facility, namely: captains, lieutenants, sergeants, and security officers. Specifically in July 1999, the Board certified the Union as representative of the Company's security officers at Turkey Point. The Board noted the category "security officer" included central and secondary alarm station operators, unarmed security officers/watchmen, and part-time security officers. Prior to the election that resulted in the above unit being certified the Company stipulated it did not oppose the inclusion of the central and secondary alarm station operators in the bargaining unit. In 2002, the Union filed a petition seeking to represent the sergeants at Turkey Point. The Company opposed the petition, asserting the sergeants were statutory supervisors. The Regional Director of Region 12 of the Board issued a decision and direction of election, in which she found the sergeants were not supervisors under the Act. The Board denied the Company's request for a review of the Director's decision. On March 4, 2003, the Union was certified as the representative of the Company's sergeants.

On May 28, 2003, Florida Power & Light issued a request for proposals with bid specifications for a new security contract setting forth staffing provisions which provided that supervisors would be defined as nonbargaining personnel and that all personnel assigned to operate the central and secondary alarm stations would be supervisors. Further, the new contract specifications called for four security shifts per day with each shift supervisor trained and certified to perform duties within the central and secondary alarm stations, as well as to perform other duties in the owner controlled and protected areas. In June 2003, the Company notified Florida Power & Light that if it was awarded the new contract operations at Turkey Point it would change its operations in three ways: (1) The part-time program would be eliminated; (2) The central and secondary alarm station operators would be supervisors; and (3) The position of sergeant would be eliminated. The Company was thereafter awarded the new security contract with Florida Power & Light.

After obtaining the new contract with Florida Power & Light, the Company announced a posting for new supervisory positions with a requirement that applicants be able to operate the central and secondary alarm stations. The Company then filled 15 lieutenant positions by promoting unit employees into the new positions. Starting on September 1, 2003, all central and secondary alarm station duties were performed by lieuten-

ants. As a result of the changes implemented on September 1, 2003, the Company no longer employed anyone in sergeant positions. The Board found the Company violated the Act by eliminating the sergeant positions and by eliminating the central and secondary security operators from the bargaining unit and reclassifying the operators as nonunit lieutenants. The Board also concluded the Company had failed to establish the new lieutenants "assigned to perform CAS/SAS [central alarm station/secondary alarm station] possessed or exercised supervisory authority."

With that brief review, I now turn to the facts surrounding the issues herein. The Company's highest ranking individual at Turkey Point is Project Manager Mareth. He is assisted by Operations Coordinator Rodriguez, Training Coordinator Roy McCloud, Leadership Development Manager Macdonald, and various other administrative personnel. There are five security officer shifts. Each shift has 1-team shift captain, 7 lieutenants, and approximately 37 security officers assigned. The security teams are referred to as Alpha, Bravo, Charley, Delta, and Echo. The Echo team is a training team that actually fills in for each of the other four teams as each team must rotate into a week of security training every 5 weeks. There are four teams performing security services and one team in training at all times. At applicable times herein (February 2010), there were approximately 170 security officers employed at Turkey Point.

The current applicable unit description for security officers follows:

The Company recognizes the International Union, Security, Police, Fire Professionals of America (SPFPA) and its Amalgamated Local No. 610 as the exclusive collective bargaining representative for all employees designated by the National Labor Relations Board's Certification of Representative issued on July 8, 1999 in case No. 12-RC-8349, including all security officers, and watchpersons [Unarmed Officers], performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act, as amended, who are employed by the Employer at the Turkey Point Nuclear Power Plant, located in Florida City, Florida; but excluding all office clerical employees, professional employees and supervisors as defined in the National Labor Relations Act, as amended.

Frazier was hired as a security officer in 1989 and Mack in 2002. Both were promoted to lieutenant in 2003. Both Frazier and Mack were suspended from work a few days before they were terminated on February 15, 2010. Frazier's termination notice reflects "Failure to meet satisfactory leadership expectations." Mack's termination notice reflects "Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process management completed a review of Cecil's personnel file. As a result of the review it is management's perspective that Cecil's performance does not meet satisfactory job performance or behavior standards."

## 2. Company's evidence

As noted earlier the Company, asserts as an affirmative defense, that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act. With that assertion the Company assumes the burden of proving their supervisory status. I



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consider the Company's evidence first as it is the party asserting the supervisor status and afterward, I shall consider evidence presented by the Government bearing on the issue.

I note the position of lieutenant existed prior to Frazier and Mack applying for and being promoted to lieutenants in the fall of 2003. Frazier and Mack received pay raises at the time of their promotions. Project Manager Mareth testified the pay differential between security guards, which Frazier and Mack were, and lieutenants, to which they were promoted, was approximately \$4 per hour. Lieutenants Frazier and Mack received more life insurance coverage than the security officers. Project Manager Mareth testified when an employee is promoted to lieutenant he/she is given additional training not provided to the security officers. The additional training is designed to, in part, give the lieutenant "a better understanding of . . . performing oversight and observation of day-to-day activities" a lieutenant will encounter. Mareth further explained the training for lieutenants is at a "higher level" than training for the security officers. Leadership Development Coordinator Macdonald testified she conducts 80 hours of initial leadership training with lieutenants that includes interpersonal and presentation skills, training which is not provided to the security officers. Lieutenants also receive, on an ongoing basis, training not provided to the security officers. Lieutenants meet with upper management at least once per month without security officers being present.

Newly selected lieutenants, including Frazier and Mack, signed various documents after becoming lieutenants they had not been required to sign as security officers. One such form was a "Supervisory Requirements" form. On the "Supervisory Requirements" form lieutenants are instructed they should use coaching techniques as well as counseling and progressive discipline to correct unprofessional conduct and poor job performances and are to do so fairly and consistently. On the form lieutenants are instructed to seek management assistance and input when needed. Frazier and Mack acknowledged, on the signed forms, they were to "[m]ake those accountable to [them] aware of what [they] expect[ed] from them." The two acknowledge on the signed forms they were to "lead by example" and "keep issues discussed between supervisors confidential." Frazier and Mack specifically understood the Company viewed them as supervisors. Frazier and Mack each signed a Company "Leadership Pledge" agreement in which they agreed they would not tolerate inattentiveness within the ranks of their direct reports; they would be receptive to concerns and questions raised by their direct reports; they would not tolerate retaliation or peer harassment within the ranks of their direct reports; they would be observant to the work place behaviors of their direct reports; they would listen effectively and respond appropriately to their direct reports; they would use a nonthreatening communication style with their direct reports; and, they would develop, coach, mentor and train their direct reports. In signing the "Leadership Pledge" both wrote the description of their position as that of "Supervisor."

Frazier and Mack also executed "Management Challenge" forms in which they acknowledged that as part of the "management team" they had an "obligation to operate above the standard expectations" of their colleagues and being in supervi-

sion carried an accountability on their part for their teams performance. Both acknowledged the Company is committed to supporting them with relevant training to be successful supervisors and they were aware of what it meant to supervise armed personnel and that management standards for its supervisors in this type environment had to be exceptionally high.

Local Union 610 President and security officer Timothy Lambert testified regarding the duties of Frazier and Mack, in part, as follows:

As long as I've known them and they were supervisors, . . . I went to them because they cared about what was going on there. I mean they were two excellent supervisors that really cared about the operations.

Local Union President Lambert acknowledged that as a security officer his first line supervisor was the lieutenant.

Project Manager Mareth testified, at length, regarding the position and duties of lieutenants at the Company. There are approximately 170 security officers that report directly to lieutenants according to Mareth. Lieutenants in turn report to shift captains. Mareth explained the Company's supervisory structure is necessary so one individual, such as the captain, would not be the only one responsible for supervising "30-some officers assigned to [a] particular shift" with the responsibility of covering the several thousands of acres to be secured. Project Manager Mareth testified lieutenants provide direct oversight to the security officers in the field including addressing issues that arise on the job. Project Manager Mareth explained that while the Company is in a "regulated industry" with "a lot of procedures for what we do, you can't have a written procedure for absolutely everything that you do in the field." Mareth added lieutenants "have to utilize judgment and discretion" in performing their functions and may not have "a written line item that tells [them] what to do." Mareth said lieutenants "can either address [the issues] at their level, or if it's something that they cannot address, then they can push it to a higher level and it just continues all the way up . . . to my [Project Manager] level." Mareth said lieutenants oversee security officers in all geographic areas at the Turkey Point facility and their oversight includes evaluation of the security officers.

Florida Power & Light's Turkey Point Nuclear Plant Security Department, Security Force Instruction 1106, Revision 9 titled "Field Supervisors" is applicable to the Company herein and, "provides guidance to Security Field Supervisors for performing supervisory functions of Security Officers manning security posts and assisting the Security Shift Supervisor in carrying out daily Security Operations." The title "field supervisor" and "lieutenant" refers to the same position at the Company. Field supervisors are directed to ensure; that only qualified security officers are assigned to posts; that security officers understand the specific requirements of their post; that security officers remain alert, attentive, and properly perform their duties; that security officers perform their duties in a safe environment; that security officers properly maintain post reports; and, that field supervisors initiate prompt and appropriate actions to correct any identified deficiencies including improper behavior, attitude, or inattentiveness to duty.

Project Manager Mareth described, in general terms, a lieu-

tenant's workday. The day starts with the morning shift briefing conducted by the shift captain with, as appropriate, input from the lieutenants. Lieutenants ensure the "off-going" security officers are properly relieved and then issues weapons to the "on-coming" security officers. Lieutenants perform equipment inventories which includes verifying that the security officers have all required equipment at their posts and are properly logged in and fit for duty. Lieutenants are responsible for monitoring the central and secondary alarm systems. Lieutenants field questions from and address issues raised by the security officers and make required security observation reports. Project Manager Mareth stated lieutenants correct, coach and counsel, as needed. Lieutenants generally do not perform security officer duties.

Project Manager Mareth further explained that lieutenants are the first line supervisors to whom the security officers' report, and can issue any type discipline, excluding termination, without consulting a supervisor. The Company has a three level progressive disciplinary policy that consists of four steps. Step one is oral counseling; step two is written disciplinary counseling; step three is written disciplinary counseling and suspension; and step four is termination of employment. Stated somewhat differently level I, the highest level, results in termination. Level II is a documented discipline such as written warnings, an accumulation of which results in termination. Level III, the lowest level of discipline, typically starts with a verbal warning or a verbal warning that is documented. The progressive discipline policy and procedure reflects, "There are three levels of offenses (levels I, II, III). These are only guidelines for use by management and supervisor personnel." Mareth explained that if a lieutenant issued a written warning to a security officer and the security officer committed a similar infraction such would result in a suspension for the security officer. Project Manager Mareth testified lieutenants may, and do, exercise discretion when issuing discipline pursuant to the Company's disciplinary policies. For example, a lieutenant may decide not to issue formal discipline for an infraction or he/she can decide which level of discipline is appropriate as there is some overlap between offenses listed at the disciplinary levels. Mareth said a lieutenant may consult with the shift captain to determine if a past practice has been established for a particular offense but is not required to do so. According to Mareth lieutenants may, for example, issue a coaching, which is not part of the formal disciplinary procedure unless documented, for a first offense and if there are other like offenses determine at that time which level of discipline is warranted. According to Project Manager Mareth, lieutenants do not have to consult with their supervisor (captains) before issuing discipline. Eight employee disciplinary/corrective action notices, issued by 6 lieutenants, were received in evidence. Two of the disciplinary actions resulted in written warnings with 1-day suspensions; two involved written warnings only; and, four involved written disciplinary actions documenting oral warnings. Five of the disciplinary actions involved attendance infractions, two involved failure to timely report for training, and one involved a vehicle accident. None of the disciplinary/corrective action notices in evidence was issued by either Frazier or Mack. In fact, neither Frazier nor Mack issued any

discipline of record.

Project Manager Mareth testified lieutenants perform evaluations for their direct reports. Mareth explained the evaluations are used in the promotional process for the security officers. Mareth named four security officers whose recent promotions were impacted by their lieutenant's evaluations and added there were perhaps eight other like situations, over the previous year and half. No one higher in management than a lieutenant regularly evaluates, in writing, the security officers. The evaluations prepared by the lieutenants are used in the promotional process in accordance with the Company's policy manual at "Promotion Policy and Procedure." The manual states in part, "the promotion process consists of several stages. The required stages are as follows . . . review of performance appraisals." The portion of the manual covering promotions further states, in part, that the promotion board shall review the personnel file for each applicant for promotion with specific attention given to performance appraisals.

According to Mareth, lieutenants can be disciplined, up to and including discharge, if they fail to ensure the quality of performance of the security officers under their command. Mareth explained that a failure to ensure quality performance by the security officers could also impact promotional opportunities for lieutenants.

With respect to evaluations for the security officers, Charging Party Mack acknowledged that for 2 years prior to his discharge he evaluated the six security officers that reported directly to him and he did so on a quarterly, as well as, annual basis. Mack said he was told to perform the evaluations by his immediate shift supervisor. Mack explained the evaluations were mainly to set goals for the security officers. Mack went over each evaluation with each security officer involved before he turned the evaluations over to his superior, the shift captain.

Frazier also testified he evaluated the security officers that reported to him on a quarterly and annual basis and was instructed by his immediate supervisor, Captain Ferrer, to do the evaluations starting some 2 years prior to his discharge. Frazier said he individually reviewed the evaluations with each security officer and had them sign their evaluation before he turned the evaluations over to Captain Ferrer. Frazier said he sometimes made Captain Ferrer aware of what he had placed in a security officer's evaluation in case the officer questioned the evaluation. Frazier identified some 83 pages of evaluations, which were received in evidence, he made of certain security officers that reported to him.

### 3. Government's evidence relating to the supervisory issue

Frazier testified he commenced working for the Company at Turkey Point in May 1989 when it was known as the Wackenhut Corporation. Frazier worked as a security officer when first hired. Frazier described his security officer duties as protecting the plant from radiological sabotage by conducting patrols; standing guard at specific posts; conducting fire watch; fire watch patrols, checking doors, and equipment; responding to contingencies; doing vehicle patrols of owner-controlled areas; working at various entry gates; searching vehicles and materials; and, preventing unauthorized personnel and/or materials from entering the plant. Frazier said he conducted himself, and

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carried out his assigned duties in accordance with Security Force Instructions established by Florida Light & Power and the Company which provided him guidance on his job, functions and instructed him how to react in any given situation. Frazier said that late in his tenure as a security officer he became central and secondary security alarm certified and monitored computer screens for alarms at vital areas or fenced zones. As a certified central and secondary alarm security officer Frazier said he would run reports, answer telephones, provide information to the captains and dispatch officers to alarms in accordance with the Security Force Instructions. Frazier said his overall security officer duties did not change when he became a certified central and secondary security alarm officer that he just assumed the extra duties.

Frazier testified his position "changed slightly" when he became a lieutenant in September 2003 and was assigned to the B Team where he worked seven 12-hour shifts every 14 calendar days and reported to Shift Captain Quentin Ferrer. Frazier described his lieutenant duties as, "ensuring that qualified security officers are manning the various posts, qualified in the SFI [Security Force Instructions]," "to verify the paperwork, to ensure that the general purpose logs and post or patrol logs are correctly filled out," and to, "ensure that the officers were alert, attentive, are aware of their assigned duties as set forth by the general purpose log and the SFIS." Frazier further explained his duties included ensuring the security officers "equipment was in proper working order and not damaged or been tampered with" and to ensure the security officers worked in a safe clean environment and conducted their patrols according to the Security Force Instructions. Frazier said his central and secondary alarm system duties remained the same as when he was a security officer. Frazier said he knew what all of his duties as a lieutenant were because his duties were written out in the Security Force Instructions, training manuals, administrative directives and by his lengthy experience at Turkey Point. Frazier added there had been sergeant positions at the Company at the time he was a security officer but by the time he became a lieutenant in September 2003, the sergeant positions had been eliminated. Frazier explained sergeants "essentially" performed the same tasks he performed as a lieutenant but after further questioning by Government Counsel Frazier stated sergeants and lieutenants performed the same job.

Frazier testified he had daily contact with security officers, other lieutenants and at least 1 captain. He said he commenced his work day at the shift briefing attended by those mentioned above, as well as, on occasion Florida Power & Light security oversight specialists and other Company management such as Project Manager Mareth and Operations Coordinator Juan Rodriguez. According to Frazier the shift captain addressed the shift collectively and disseminated pertinent information for the day, such as the status of the units, making note of any fence or door zones that might be out of order or any new posts that had been established. According to Frazier the shift captain determined post assignments and reflected those assignments on a post assignment sheet, copies of which were given to the security officers and lieutenants. Frazier explained that with the assignment sheet he knew where each of his security officers would be posted and he visited each post during the shift. Fra-

zier said that while he was at each post he verified that the proper security officer was at his/her assigned post and reviewed the general purpose and inventory logs with the security officer as well as checked the security officers' weapons. According to Frazier the shift captain never discussed shift rotations with him before issuing them. Frazier said he did not direct the work of the security officers that reported to him "because the work is defined in the general purpose log," "[t]he officer reads that. Those are his post instructions." Frazier explained his responsibility was just to ensure the security officers understood his/her post instructions. Frazier stated some security officers preferred some posts over other posts and added he had the authority to transfer security officers from one post to another during a shift, under some circumstances but, only after requesting approval from the shift captain. On cross-examination, Frazier acknowledged he had stated in a pretrial affidavit he had the authority to transfer a security officer from one post to another on his shift for operational needs and he "did not generally consult with the captain before doing so."

Frazier testified he had given security officers "coachings" which he considered to be "peer checking." A "coaching" according to Frazier, may involve instructing a security officer to sit up straight instead of slouching, or to be a little more vigilant in the area where he/she was assigned. Frazier said coaching is not a form of discipline. Frazier said he had never issued discipline to security officers reporting to him because they all knew their jobs. Frazier on direct examination, said he could issue oral or written discipline to his security officers for not doing their job duties or being inattentive or not following guidelines in the general purpose log only after first bringing it to the attention of his shift captain to ascertain the appropriate disciplinary action. Frazier acknowledged on cross-examination that specific supervisory requirements applicable to him directed him to not only use coaching techniques but to utilize counseling and progressive discipline to correct unprofessional conduct or poor job performance by the security officers.

Frazier testified that about 2 years before his discharge he began to evaluate, on a quarterly and annual basis, those security officers reporting to him. Prior to that time evaluations were performed by the captain. The quarterly evaluations designated as "one-on-one" reviews were, according to Frazier, for the purpose of bringing about improvement in the security officers attendance, communication skills and knowledge of the Security Force Instructions. After preparing the quarterly and annual reviews for his security officers Frazier gave them to his shift captain or Operations Coordinator Rodriguez. Frazier explained he reviewed each evaluation with the applicable security officer before giving them to the captain and, on occasion, would speak with his shift captain about a specific evaluation in case "the officer came back and was questioning it." Frazier testified, on direct-examination, that as far as he knew the evaluations were used only to "improve the deficiencies that the officers may have." When asked on cross-examination if a bad evaluation could affect a security officers future promotional opportunities, Frazier testified "as far as I know, the one-on-ones and the evaluations were not used for promotion. They were used . . . to get the officer to improve his performance. I do not know if it was used . . . to promote." However, after



being given an opportunity to review his pretrial affidavit, Frazier acknowledged that if a security officer continually received bad evaluations or reviews the officer "may not be considered for a promotion." Frazier did not know of any security officer being promoted based on his evaluation of the security officer. Frazier acknowledged he had recommended security officers receive meal tickets or "a letter incentive award" but added even other security officers could recommend a fellow security officer for a meal or small incentive award.

Mack's testimony, regarding his duties and authority as a lieutenant, though in less detail, was for the most part, the same as Frazier's testimony. Mack testified that everything he did every minute of every day as a lieutenant was explicitly covered in detail by written policies. Mack likewise believed everything security officers did was covered and/or governed by written policies and the security officers simply had to follow the policies. Mack testified the captain would issue discipline and the lieutenant who was in the area of the security officer disciplined would simply deliver the discipline to that security officer.

### III. CREDIBILITY COMMENTS, ANALYSIS, AND CONCLUSIONS

I am persuaded Frazier while testifying made an effort to minimize the authority he had and/or exercised as a lieutenant. For example, he testified some officers preferred some posts over other posts and that he had the authority to transfer security officers from one post to another during a shift, but only after requesting approval from his shift captain. However, after being confronted with his pretrial affidavit, he acknowledged he had the authority to transfer a security officer from one post to another on his shift for operational needs and did not generally consult with his captain before doing so. Frazier first testified he could issue oral or written discipline to his assigned security officers for not properly performing their jobs duties, being inattentive, or not following guidelines but, only after first bringing such to the attention of his shift captain. However, Frazier acknowledged, during cross-examination, that specific supervisory requirements applicable to him, called for him to use coaching techniques, as well as, counseling and progressive discipline to correct unprofessional conduct, or poor job performance by his security officers. Frazier testified on direct examination that evaluations he prepared for the security officers reporting to him were utilized to improve deficiencies the security officers may have, however, on cross-examination, and after reviewing his pretrial affidavit, he acknowledged that if a security officer continually received bad reviews or evaluations he/she may not be considered for promotion.

It is in light of this and other testimony by Frazier and particularly my observation of him as he testified; I am unable to fully credit his testimony regarding his duties and authority where contradicted by the testimony of others or, called into question by documentation. Thus, I have relied, to a great extent, on the testimony of Project Manager Mareth, which I credit, with respect to the duties and authority of lieutenants at the Turkey Point facility.

Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to

effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)). It is well established that the party asserting supervisory status bears the burden of proof on the issue, *Oakwood Healthcare, Inc.* at 686. The burden must be carried as to each particular individual who is alleged to be a supervisor. Section 2(11) of the Act provides that a supervisor is one who possesses, "authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

Such statutory indicia must, as noted earlier, be exercised with independent judgment on behalf of management, in the interest of management and not simply in a routine manner. The Board noted in *Oakwood Healthcare Inc.*, supra citing *Chevron Shipping Co.*, 317 NLRB 399, 381 (1995), that as a general principle, it has exercised caution not to construe supervisory status too broadly because the employee deemed a supervisor is denied rights the Act is intended to protect. The Board in *Oakwood Healthcare, Inc.*, supra, adopted definitions for the terms "assign," "responsibly to direct", and "independent judgment" as those terms are used in Section 2(11) of the Act. It is helpful to briefly highlight those definitions.

The Board noted the terms "assign" and "responsibly to direct" were not intended to be synonymous and would ascribe distinct meanings to both terms. The Board construed "assign" to refer to the act of designating an employee to a place, a time or giving significant overall duties or tasks to an employee. The Board noted the place, time and work of employees are part of their terms and conditions of employment and decisions, or effective recommendations, to affect one of those can be supervisory functions. The Board construed "responsibly to direct" as where the putative supervisor is answerable for the performance and work product of the employees he/she directs. That is, there must be some adverse consequence for the one providing oversight if the tasks performed by the employees are not performed properly. The Board specifically stated; "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps."

The Board in ascertaining the contours of "independent judgment" looked at the ordinary meaning of the two words. "Independent" means "not subject to control of others" and "judgment" the action of judging or the mental or intellectual process of forming an opinion or evaluation by discerning and comparing. The Board used, as a starting point, that for one to exercise "independent judgment" "an individual must at a minimum act, or effectively recommend action, free of control of others and form an opinion or evaluation by discerning and

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comparing data." The Board noted it was interpreting "independent judgment" in light of the contrasting statutory language, "not of an merely routine or clerical nature." The Board stated; "It may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definition of those terms, but still not rise above the merely routine or clerical." The Board stated that its view, as well as the Supreme Court's view was that actions fall into a spectrum between the extremes of completely free actions and completely controlled ones, "and the degree of independence necessary to constitute a judgment as 'independent' under the Act lies somewhere in between these two extremes." The Board said it would find "a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." (Footnote omitted.) However, the Board went on to state; "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision making if the policies allow for discretionary choices. [footnote omitted]" The Board summarized as follows:

Section 2(11) contrasts "independent judgment" with actions that are "of a merely routine or clerical nature." Thus, the statute itself provides a base line for the degree of discretion required to render the exercise of any of the enumerated functions of 2(11) supervisory. The authority to effect an assignment, for example, must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the "routine or clerical." [footnote omitted]

In deciding whether the two lieutenants herein are supervisors within the meaning of the Act I am mindful the security of nuclear facilities is highly regulated. I take guidance from *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), a case where the Board refined the analysis to be applied in assessing supervisory status and set forth clear broadly applicable guidance for situations like those herein.

First, I find the lieutenants are supervisors under Section 2(11) of the Act based on the fact they prepare evaluations of the security officers that, in part, are considered in determining whether the security officers are promoted. Lieutenants Frazier and Mack both, for some 2 years prior to their discharge, prepared quarterly and annual reviews or evaluations for the security officers reporting to them. In fact, no one higher than a lieutenant at the Company regularly prepares written evaluations of security officers. Both Frazier and Mack reviewed the evaluations they prepared with the security officers involved before the evaluations were turned over to higher management. I note Frazier first explained the evaluations he made of the security officers that reported to him were simply to have the security officers improve their performance, but, he acknowledged bad evaluations could impact a security officer's consideration for promotion. The record evidence establishes evaluations created by lieutenants are specifically utilized in the promotional process. The Company's policy manual at "Promotion Policy and Procedure" requires, among the several stages

in the promotion process, that a review of applicable performance appraisals be conducted by the promotion panel. More specifically, the promotion policy and procedures manual requires the Company's promotion board to review the personnel file of each applicant for promotion and to specifically review performance appraisals. Project Manager Mareth specifically stated evaluations made by lieutenants at the Company are utilized in the promotional process for security officers. Mareth even recalled four security officers whose recent promotions were impacted by their lieutenant's evaluations and he indicated there were perhaps eight other like situations where security officers' promotions were impacted by their lieutenant's evaluations in the previous year to year and half. I note Frazier and Mack did not need to consult with their superiors before evaluating their direct reports, nor did they need to discuss with their supervisors the content of evaluations before preparing and going over the evaluations with those evaluated. Frazier and Mack performed evaluations free from the control of others in management and made their evaluations and formed their opinions, it appears, by their own discernment and comparisons. It is clear evaluations impact promotions of the work force and are performed in the interest of the Company. In summary, Lieutenants Frazier and Mack independently performed evaluations for their direct reports which lead to personnel actions (namely promotions) affecting the security guards involved and by doing so engaged in one (promote) of the enumerated supervisory functions within the meaning of Section 2(11) of the Act.

Lieutenants, as first line supervisors, have the authority to and do issue discipline. The Company's progressive discipline policy and procedure "provides guidance on the administration of discipline" for its supervisors who "are responsible for administering this policy as it applies to employees under their supervision." As Project Manager Mareth explained, lieutenants can issue any type discipline, except termination, without consulting with a supervisor. Lieutenants are generally the individuals issuing the initial step(s) in the Company's progressive disciplinary process. The evidence establishes lieutenants have certain discretion when issuing discipline pursuant to the Company's policies. As Project Manager Mareth explained, a lieutenant may decide not to issue formal discipline at all, or to choose which level of discipline an infraction will be placed because of some overlap between levels. It is clear lieutenants exercise independent judgment by deciding whether to initiate the progressive disciplinary process in the first place and lay a foundation for future discipline against their direct reports. The Company presented, in evidence, examples of lieutenants issuing discipline to security officers. Two of the disciplines resulted in written warnings with a 1-day suspension in each. While none of the eight examples where initiated by Frazier or Mack it appears they clearly had the authority to do so. Frazier, for example, explained he never issued any discipline for the security officers that reported to him because each knew and performed their job duties. In summary, lieutenants have the authority to issue security officers discipline and have in fact issued discipline up to and including suspension without the necessity of consulting with or obtaining approval of their superiors. I find such to establish that lieutenants of the Company

## DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

are supervisors within the meaning of Section 2(11) of the Act.

It is clear shift captains prepare shift post assignments which are then disseminated to the lieutenants and security officers which reflect the initial post assignments for security officers on any given day. However, as Frazier testified, he had the authority to transfer security officers from one post to another for operational needs during a shift. Frazier, first stated he had to request approval from the shift captain, but then acknowledged he generally did not consult with the captain before making such changes in post assignments. Frazier explained some security officer's preferred one post assignment over other assignments during a shift. Thus, in designating a place, a time, and tasks to be performed when he transferred a security officer from one post to another, Frazier engaged in a supervisory function within the meaning of the Act. The discretion Frazier, or other lieutenants, utilized in transferring security officers from one post assignment to another, in my opinion, involves a degree of discretion rising above the level of routine or clerical and is done in the interest of the Company.

Lieutenants provide direct oversight to security officers in the field and address issues that arise on the job. Lieutenants are directed to ensure that security officers assigned to them understand the specific requirements of their post, that they remain alert, attentive and perform their duties in a proper and safe manner, and that they properly maintain post reports. The lieutenants are to initiate prompt and appropriate action to identify and correct any deficiencies in the security officers including improper behavior, attitude, or inattentiveness to duty. Project Manager Mareth explained lieutenants can be disciplined, up to and including discharge, if they fail to ensure the quality of the performance of the security officers assigned to them. Likewise, Mareth further explained, a failure on a lieutenant's part to ensure quality performance by the security officers could impact promotional opportunities for the lieutenant. Here lieutenants direct the work of security officers and have authority to take corrective action as appropriate and are subject to adverse consequences if they fail to properly direct the security officers that report to them. I find lieutenants responsibly direct the work of security officers within the meaning of Section 2(11) of the Act.

All the above establishes lieutenants are supervisors within the meaning of the Act. In addition to the above findings there are secondary indicia that further support my conclusion the lieutenants are supervisors. Lieutenants are paid more; provided additional insurance not provided to security officers, given additional training not given to security officers, attend management meetings that security officers do not attend, and, the Company views them as supervisors. The secondary indicia most compelling is if the lieutenants are not supervisors then each captain is responsible for 30 plus security officers with assigned duties at various locations on the thousands of acres at a nuclear facility.

In summary, I find the Company established that Thomas Frazier and Cecil Mack were supervisors within the meaning of Section 2(11) of the Act at all times material herein, and not protected by the Act. I find the Company did not violate the Act when it suspended and, thereafter, discharged Frazier and Mack on February 15, 2010.

## CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of the Section 2 (2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Thomas Frazier and Cecil Mack were, at applicable times, supervisors within the meaning of Section 2(11) of the Act.
4. The Company has not violated the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>3</sup>

## ORDER

The complaint is dismissed.

Dated Washington, D.C. June 27, 2011

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## EXHIBIT C

APRIL 30, 2013 DECISION AND ORDER  
Cases 12-CA-026644 and 12-CA-026811



*NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.*

**G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA) Inc., f/k/a The Wackenhut Corporation and Thomas Frazier and Cecil Mack.** Cases 12-CA-026644 and 12-CA-026811

April 30, 2013

**SUPPLEMENTAL DECISION AND ORDER**

**BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK**

On November 16, 2012, Administrative Law Judge William N. Cates issued the attached supplemental decision. In the underlying decision, 358 NLRB No. 160 (2012), the Board reversed the judge's finding that Charging Parties Thomas Frazier and Cecil Mack are supervisors under Section 2(11) of the Act. Having found that Frazier and Mack are statutory employees, the Board remanded this case to the judge to determine whether the Respondent violated Section 8(a)(1) when it discharged them.

After the judge issued his supplemental decision, the Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief. The Acting General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the supplemental decision and the record in the light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.<sup>1</sup>

<sup>1</sup> We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. In addition, in accordance with our recent decision in *Latino Express*, 359 NLRB No. 44 (2012), we shall order the Respondent to compensate Thomas Frazier and Cecil Mack for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters. We shall substitute a new notice to conform to the Order as modified.

The Respondent contends that the Board lacks a quorum because the President's recess appointments are constitutionally invalid. We reject this argument. We recognize that the United States Court of Appeals for the District of Columbia Circuit has concluded that the President's recess appointments were not valid. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). However, as the court itself acknowledged, its decision conflicts with rulings of at least three other courts of appeals. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Alocco*, 305 F.2d 704 (2d Cir. 1962). This question remains in litigation, and pending a definitive resolution, the Board is

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by discharging Frazier and Mack.<sup>2</sup> We also agree with the Acting General Counsel's contention that their suspension a few days before they were discharged was likewise unlawful. Inasmuch as the suspensions were steps taken as part of the Respondent's unlawful discharges of the two, we find that the suspensions also violated Section 8(a)(1) of the Act. See *Fort Dearborn Co.*, 359 NLRB No. 11, slip op. at 1-2 (2012).

**ORDER**

The National Labor Relations Board orders that the Respondent, G4S Regulated Security Solutions, a Division of G4S Secure Solutions (USA) Inc., Miami-Dade County, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or suspending employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their

charged to fulfill its responsibilities under the Act. See *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013).

<sup>2</sup> In affirming the judge's finding that Frazier's and Mack's discharges were unlawful, we do not rely on any implication in the judge's decision that Frazier's discharge is appropriately analyzed under the standard set forth in *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), or that Mack's discharge is not. As to Frazier, the Respondent discharged him for conduct that the judge found, and we agree, was protected under the Act. Accordingly, motive is not at issue, and it was neither necessary nor appropriate to analyze Frazier's discharge under *Wright Line*. See, e.g., *Phoenix Transit System*, 337 NLRB 510, 510 (2002).

As to Mack, however, the Respondent contends that his discharge was motivated in part by his use of profanity on one occasion. Thus, the Respondent did put motive at issue concerning Mack's discharge, and the judge properly applied *Wright Line*. Turning to that analysis, we agree with the judge that the Acting General Counsel made an initial showing under *Wright Line* that Mack's protected, concerted activity was a motivating factor in his discharge. We also agree with the judge that the Respondent did not establish a *Wright Line* defense, because the credited testimony established that the cursing incident did not happen—and even if it did, the evidence established that Mack would have received, at worst, a documented oral counseling. Either way, the incident was a pretext, i.e., either false or not in fact relied upon, and thus there is no need to perform the second part of the *Wright Line* analysis. See, e.g., *Everflow Transportation, Inc.*, 358 NLRB No. 82, slip op. at 3 (2012).



seniority or any other rights or privileges previously enjoyed.

(b) Make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Compensate Thomas Frazier and Cecil Mack for any adverse income tax consequences of receiving their backpay in one lump sum, and file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the discharges and suspensions, and, within 3 days thereafter, notify the employees in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Miami-Dade County, Florida facility copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all cur-

rent employees and former employees employed by Respondent at any time since February 2, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 12 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 30, 2013

<u>Mark Gaston Pearce,</u>	<u>Chairman</u>
<u>Richard F. Griffin, Jr.,</u>	<u>Member</u>
<u>Sharon Block,</u>	<u>Member</u>

(SEAL) NATIONAL LABOR RELATIONS BOARD  
APPENDIX

Notice to Employees  
Posted By Order Of The  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

WE WILL NOT discharge or suspend any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL compensate Thomas Frazier and Cecil Mack for any adverse income tax consequences of receiving their backpay in one lump sum, and WE WILL file reports with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

<sup>3</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## G4S REGULATED SECURITY SOLUTIONS

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges and suspensions of Thomas Frazier and Cecil Mack, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and suspensions will not be used against them in any way.

G4S REGULATED SECURITY SOLUTIONS, A  
DIVISION OF G4S SECURE SOLUTIONS (USA)  
INC.

*Shelley B. Plass, Esq., for the Acting General Counsel.<sup>1</sup>*  
*Fred Seleman, Esq., for the Respondent.<sup>2</sup>*

## SUPPLEMENTAL DECISION

WILLIAM N. CATES, Administrative Law Judge. These are two discharge cases I heard in Miami, Florida, commencing on April 4, 2011, pursuant to a complaint that issued on December 29, 2010. The discharged employees were Thomas Frazier and Cecil Mack. On June 27, 2011, I issued a Decision and Recommended Order in which I found that Frazier and Mack were supervisors within the meaning of Section 2(11) of the Act and that the complaint be dismissed. On September 28, 2012, the Board issued a Decision and Order remanding in which it found that Frazier and Mack were not supervisors. *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012).

In my initial decision I specifically noted that, in view of my finding that Frazier and Mack were supervisors, "the remaining issues need not be addressed, namely, whether Frazier and Mack engaged in concerted activities protected by the Act and whether they were discharged for doing so," nor did I need to address "the Company's affirmative defense that Frazier and Mack were discharged for valid considerations not based on unlawful motives or considerations."

The Order remanding the case to me directs that, "based on the existing record, the judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended order regarding solely the Section 8(a)(1) discharge allegations." Following receipt of the foregoing Order, I conducted a conference call with the parties who stated their desire to file briefs. The briefs filed by the parties have been received and considered.

## FINDINGS OF FACT

## A. Facts

As set out in my initial decision, Frazier was hired as a security officer in 1989, and Mack in 2002. Both were promoted to lieutenant in 2003. Both Frazier and Mack were suspended from work a few days before they were terminated. Mack was suspended on February 2, 2010, and informed that he was ter-

minated on February 22. Frazier was suspended on February 12, 2010, and informed that he was terminated on February 15. Frazier's termination notice states: "Failure to meet satisfactory leadership expectations." Mack's termination notice states: "Cecil was involved in an incident with the client that involved undesired behavior. As a part of the process management completed a review of Cecil's personnel file. As a result of the review it is management's perspective that Cecil's performance does not meet satisfactory job performance or behavior standards."

Project Manager Michael Mareth explained that the Company had not "hit the mark in our performance of supervisors ... because we didn't have the right oversight of the officers in the field." The Company's senior executives at headquarters and Florida Power & Light, the client and operator of the Turkey Point facility, agreed to initiate a leadership effectiveness program pursuant to which reviews of all supervisors were undertaken. The directive to perform those reviews came from Tim Kendall, president of the Company. Mareth confirmed that, as a result of the reviews there were "a number of individuals that were terminated because they didn't meet the expectations." Five lieutenants, including Thomas Frazier and Cecil Mack, were discharged.

It is undisputed that Frazier raised various concerns on behalf of the security officers including inadequate bathroom facilities, a requirement relating to having lanyards on weapons, a requirement from Florida Power & Light requiring the wearing of vests that was not required by the Nuclear Regulatory Commission, uncomfortable chairs, and insufficient water. Mack raised issues relating to security officers including being posted in the sun for 6 hours without any shelter, an inadequate supply of water, the vests being too hot, and complaints of "not being treated fairly." Their testimony was not contradicted. Counsel for the Company acknowledged that "the Company does not dispute, as a basis matter, that the two individuals [Frazier and Mack] brought issues to the attention of management."

Project Manager Mareth confirmed that he expected lieutenants to "give me feedback," whether it be issues relating to Florida Power & Light or "my supervision." The leadership effectiveness reviews reflect that he also expected them to deal with the issues they raised as supervisors, not as rank-and-file employees. The leadership effectiveness reviews rated lieutenants and captains in three areas, supervisor effectiveness, communication, and setting high standards for team performance. The Company considered lieutenants to be supervisors in making its evaluations.

The leadership effectiveness review of Frazier rated him as unsatisfactory in all three categories. Comments relating to his supervisory effectiveness included the following statements: "He doesn't see himself a part of management and therefore is not leading us into the future," and, at team briefing, "[O]penly criticizes management decisions." In the area of communication, the comments note that Frazier "fails to balance the need of the organization with his sensitivity to individuals." Regarding setting high standards, the review notes that Frazier's "sensitivity to individuals is an overused strength with negative

<sup>1</sup> I shall refer to counsel for the Acting General Counsel as counsel for the Government and to the Acting General Counsel as the Government.

<sup>2</sup> I shall refer to counsel for the Respondent as counsel for the Company and I shall refer to the Respondent as the Company.

impact."

Frazier was suspended on February 12, 2010, and discharged on February 15. At the discharge meeting, Mareth informed Frazier that he did "not effectively support management" and "would not effect change going forward." Frazier responded that, even though he did not agree with all the policies and procedures, he always followed them, and that "he was a voice for the security officers and the other lieutenants and it was not right for him to be terminated." Mareth did not state any specific dereliction on the part of Frazier.

Mack was also rated unsatisfactory in all three categories. Comments relating to his supervisory effectiveness included the following statement: "He doesn't see himself a part of management and as viewed by one direct report [i.e. a security officer], 'Is on the security officer's side.'" In the area of communication, the comments state that Mack had an "over alignment with security officer concerns," and that he is "more of 'a team member' than a team leader." He is criticized with regard to setting high standards because he "does not seek different opinions from all levels of management to gain a balanced approach to team performance."

Mareth claimed that an additional basis for the discharge of Mack was an incident that occurred on January 25, 2010, 3 weeks before he was discharged. On that date Mack had dealt with an incident in which access to the plant had been delayed for about 10 employees due to issues with one of the security entry machines. Brett Rittmer, site security manager for Florida Power & Light, was present when the incident occurred. When the situation was resolved, Mack and Rittmer entered the plant and went into the final access control (FAC) office where two security officers, Anthony McKay and Johnnie Davis, were present. In the office they "were joking about it because I mean it was just a big misunderstanding." Mack could not recall what, if anything Rittmer said, but "it was in a laid back setting."

Three days after the incident, Mack was called to the office of his supervisor, Captain Quintin Ferrer. Ferrer and Operations Coordinator Juan Rodriguez were present. Mack was asked what had happened on January 25. Mack explained what happened. They asked whether he used the word "cluster fuck" in front of Rittmer. Mack denied using those words. They asked him to write a "statement saying so." Mack did so and, a couple of hours later, gave his statement to Juan Rodriguez to give to Project Manager Mareth. He gave a copy of the statement to Captain Ferrer who "read it and he tore it up." Ferrer told Mack that it "sounds good," and Mack reported back to his shift.

On January 31, Captain Ferrer had Mack report to shift because the shift was low on manning levels and told him not to report to training. The next day Ferrer called Mack and told him "not to report to the shift or training," that he was being suspended for the "bullshit incident that happened in the hallway." Mack was directed to wait for a call from Project Director Mareth the next day. Mareth did not call, and so, on February 3, 2010, Mack called him. Mareth told Mack that it was alleged that he had used foul language in front of Florida Power & Light security and that he was "on suspension pending investigation."

Mareth called Mack and requested him to come in on Febru-

ary 22 "so we could speak." Mack requested that Rittmer be present at the meeting. The meeting was at noon on February 22, and Rittmer was present initially as were Mareth, Rodriguez, and Mack. Mack asked Rittmer why "he waited a couple of days" to bring up the issue of him using foul language or acting in an unprofessional manner at that time." Rittmer answered that he "had his vacation on his mind." Mareth told Rittmer that he could leave.

Mack asked Rodriguez why he did not speak up when he knew that "I didn't curse." Rodriguez said that he "couldn't say that I did or didn't" because he was located in the FAC office and Mack "was outside in the hallway ... addressing the situation, but he did say I did seem calm."

Mareth stated that the investigation was concluded and that he was terminating Mack because a witness had said that he had "used foul language." Mack responded that "there were witnesses that said that I didn't use foul language." Mareth said that "because of the conflicting stories that he was terminating my employment." As pointed out in the brief of the General Counsel, the leadership effectiveness review was not mentioned. So far as Mack knew, the January 25, 2010 situation was the reason for his discharge.

Although the Company's brief asserts that "Mack was loud and aggressive and used profanity during a discussion with the security manager" there is no credible evidence in that regard. Mack's discharge document, cites "undesired behavior" and failure to meet "expectations for Supervision," and that he is being issued a "Level I violation." The undesirable behavior is not described. Mareth mentioned only "foul language" when discharging Mack. Rodriguez "couldn't say" whether Mack "did or didn't" use foul language because he was in the FAC office. He said that Mack "did seem calm."

Rittmer, in a statement dated February 1, wrote that, when dealing with the situation, Mack referred to it as a "cluster fuck." He does not report that Mack was "loud and aggressive." Although Florida Power & Light Security Shift Coordinator Charles Sengenberger claimed that Mack said "cluster fuck" in a voice "loud enough for everyone to hear," no one other than Rittmer reports hearing those words. Florida Power & Light Security Analyst Ted Ostenson, although stating that Mack "appear[ed] to be making his point in an overly 'assertive' manner," did not claim that Mack used the words "cluster fuck." Three Company security officers who were present, Antoine Giffried, Edward Daniels, and Nikki Napier gave statements that do not mention Mack saying "cluster fuck."

Neither Rittmer nor Sengenberger, the only individuals claiming that Mack said "cluster fuck," testified. Rittmer took no immediate action and claimed that he did not do so because he "had his vacation on his mind." I conclude, Rittmer, notwithstanding his vacation, would not have tolerated "loud and aggressive" conduct and use of profanity by Mack. He would have taken immediate action. Even if the alleged comment had been made, it was descriptive of the situation. There is no claim or evidence that the alleged comment was directed to Rittmer. Mack denied using that language, and I credit Mack.

The Company has a progressive discipline policy. Level I offenses include serious offenses such as abandoning a security post, fighting, and inattention to duty. Less serious Level II



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offenses include failure to follow procedures that affect security effectiveness and unexcused absences. Level III offenses include various offenses including smoking in unauthorized areas and using abusive or offensive language. A first offense for a Level III violation under the disciplinary policy is an oral counseling. There is no evidence that any employee has been terminated for using offensive language when describing a situation.

The security officers below the grade of lieutenant are in a bargaining unit represented by Local Union 610 of the Security Police and Fire Professionals of America. Timothy Lambert, president of Local 610, testified without contradiction, that it is "fairly prevalent to hear profanity throughout your working day." He acknowledged that abusive or offensive language towards another person would not be tolerated, but when directed to a situation "there's not much response to it," that "occasionally someone [who is offended] will say something."

#### B. Analysis and Concluding Findings

The complaint alleges that Frazier and Mack were discharged for engaging in protected concerted activity.

My decision herein is predicated upon the determination by the Board that lieutenants are not supervisors. Board precedent establishes that an employer's good-faith belief that individuals whom the employer considers to be supervisors but who are found to be employees does not deprive those employees of the protections of the Act. In *Pilot Freight Carriers, Inc.*, 221 NLRB 1026, 1028 (1975), the Board held: "[W]e find it immaterial that Respondent had ... a good-faith belief that its dispatchers were already supervisors within the meaning of Section 2(11) of the Act.

More recently, in *Shelby Memorial Home*, 305 NLRB 919, 919 fn. 2 (1991), enfd. 1 F.3d 550 (7th Cir. 1993), the Board held that "[a]n employer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act. See *Sav-On Drugs*, 253 NLRB 816, 820-821 (1980), enfd. 728 F.2d 1254 (9th Cir. 1984)."

The Company, in its brief, citing *Pillows of California*, 207 NLRB 369, 372 (1973), argues that the Company's good-faith belief about the lieutenants' supervisory status is a factor in determining whether it violated the Act. That case is inapposite. In that case, decided in 1973, before *Pilot Freight Carriers, Inc.*, an attorney had interrogated a purported supervisor who was found to be an employee. The judge determined that the attorney made prefatory remarks relating to voluntariness and assured the individual of the absence of any reprisals. The judge found that, in view of the prefatory remarks and the employer's good-faith belief that the individual was a supervisor, it would not serve the purposes of the Act to find that by such interrogation the Company violated the Act.

The brief of the Company asserts that "it is unclear in what manner each (or any) of the issues [raised by Frazier and Mack] was raised in a concerted manner or related to a protected subject." I disagree. The Company was aware that the complaints reported by Frazier and Mack including having lanyards on weapons, the wearing of vests, uncomfortable chairs, insufficient water, and being posted in the sun for 6 hours

without any shelter were complaints raised by security officers relating to their working conditions. Insofar as the Board has found lieutenants to be employees, their raising of complaints on behalf of the security officers constituted protected concerted activity.

The Company expected Frazier and Mack to deal with those complaints as if they were supervisors. As stated in the Company's brief, "the alleged discriminatees were required to be part of solving and addressing issues and presenting the management side of an issue, not just raising complaints." Because of that requirement, the leadership effectiveness review, found the performance of Frazier and Mack to be unsatisfactory. Neither Frazier nor Mack saw "himself a part of management." Frazier criticized management decisions and failed "to balance the need of the organization with his sensitivity to individuals." Mack was "on the security officer's side" and had an "over alignment with security officer concerns."

The Company, in its brief, argues that, although "other security officers and lieutenants regularly and consistently raised issues and concerns on behalf of themselves and other employees, there is no allegation that Respondent terminated or otherwise took any detrimental employment action relative to any of those other individuals for engaging in such conduct." Employees whom the Company did not consider to be supervisors were not subject to the leadership effectiveness review. There is evidence that three other lieutenants were discharged, but there is no evidence that any charge was filed with the Board relating to those discharges, thus there was no investigation or determination that the Company violated the Act with regard to those individuals.

The Company argues that its "good faith belief about the alleged discriminatees' supervisory status ... demonstrates that Respondent did not harbor animus towards the alleged discriminatees, ... and Respondent's good faith belief belies any finding of retaliatory intent." I disagree. Frazier and Mack were discharged pursuant to unsatisfactory evaluations based upon the Company's mistaken belief that they were supervisors.

The evaluations reflect that the performance of Frazier and Mack was found to be unsatisfactory because, rather than giving full allegiance to management, they did not see themselves as "a part of management" but instead were "on the security officer's side." In view of the Board's finding that lieutenants were not supervisors, their bringing complaints to management on behalf of the security officers and being on the side of the security officers constituted protected concerted activity. "The existence or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981); see also *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007).

Even if an analysis pursuant to *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), were applicable, the comments that Frazier and Mack did not see themselves as part of management, that Frazier criticized management decisions and

failed "to balance the need of the organization with his sensitivity to individuals" and that Mack was "on the security officer's side" and had an "over alignment with security officer concerns" establish animus towards Frazier and Mack because of their identification with and advocacy on behalf of rank-and-file employees. Pursuant to *Wright Line*, I find that Frazier and Mack engaged in protected concerted activity and the Company was aware of that activity. The Company bore animus towards individuals whom it deemed to be supervisors engaging in the protected concerted activity of raising complaints on behalf of security officers and thereafter being "on the security officers' side." No basis for the discharge of Frazier was cited other than the unsatisfactory evaluation that was predicated upon the Company's erroneous belief that he was a supervisor. Although the Company contends that there was a further basis for the discharge of Mack, as hereinafter discussed, I find that basis did not exist. Even if it did, discipline for the alleged offense would, at worst, have been a documented oral counseling. The Company acted "at its peril" in treating individuals who were "later ... found" to be employees as supervisors. The Company has not established that Frazier and Mack would have been discharged in the absence of their protected concerted activity.

The Company contends that there was an additional basis for Mack's discharge, an alleged comment that I have found he did not make. Insofar as Mack's alleged comment relating to a "cluster fuck" is asserted to have been a basis for his discharge, that action was an adverse action that directly affected his employment. Thus, the burden of going forward to establish that the same action would have been taken against him is upon the Company.

Mareth could not have held a good-faith honest belief that Mack had made the statement attributed to him by Rittmer and Sengenberger. Although Sengenberger claimed that Mack said "cluster fuck" in a voice "loud enough for everyone to hear," no other individual present at the access incident reported hearing that description of the situation except Rittmer. Rittmer made no contemporaneous comment to Mack, nor did he speak with him regarding his alleged offensive language when he, Mack, and security officers Anthony McKay and Johnnie Davis were in the FAC office "joking about" the access incident. At Mack's discharge interview, Rittmer claimed that he had not mentioned the offensive language because he "had his vacation on his mind." He did not state how he could have been so distracted by thoughts of his vacation that he would ignore conduct that warranted discipline, and he did not testify. The Company did not present either Rittmer or Sengenberger as witnesses. Mack credibly denied using that language. When the reason given for a respondent's action is either false, or does not exist, the respondent has not rebutted the General Counsel's prima facie case. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Company, upon the mistaken belief that Frazier and Mack were supervisors, gave them unsatisfactory evaluations and discharged them for engaging in protected concerted activities by presenting complaints on behalf of the security guards and advocating their positions regarding those complaints so much so that they were deemed not to be "a part of management" and were on "on the security officer's side." "An em-

ployer acts at its peril when it takes steps calculated to chill the exercise of Sec. 7 rights by individuals who may later be found to be under the protection of the Act." *Shelby Memorial Home*, supra at fn. 2. That is what happened in this case. The Company violated Section 8(a)(1) of the Act by discharging Frazier and Mack because of their protected concerted activity.

#### CONCLUSION OF LAW

The Company, by discharging employees Thomas Frazier and Cecil Mack because of their protected concerted activity, violated Section 8(a)(1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having unlawfully discharged Thomas Frazier and Cecil Mack, it must offer them reinstatement. The Company must also make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from February 12, 2010, in the case of Thomas Frazier, and from February 2, 2010, in the case of Cecil Mack, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The Company will also be ordered to post and email an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:

#### ORDER

The Company, G4S Regulated Security Solutions, A Division of G4S Secure Solutions (USA) Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from
  - (a) Discharging employees because of their protected concerted activity.
  - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
  - (a) Within 14 days from the date of the Board's Order, offer

<sup>3</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

## G4S REGULATED SECURITY SOLUTIONS

Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole Thomas Frazier and Cecil Mack for any loss of earnings and other benefits they suffered as a result of their discharges, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the discharges of Thomas Frazier and Cecil Mack and, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to determine the amount of back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Miami-Dade County, Florida, copies of the attached notice marked "Appendix."<sup>4</sup> Copies of the notice, on forms provided by the Regional Director for Region 12 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Company at any time since February 2, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated, Washington, D.C., November 16, 2012.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge you because of your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Thomas Frazier and Cecil Mack full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Thomas Frazier and Cecil Mack whole for any loss of earnings and other benefits they suffered as a result of their discharges, with interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Thomas Frazier and Cecil Mack, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

G4S REGULATED SECURITY SOLUTIONS, A DIVISION OF  
G4S SECURE SOLUTIONS (USA) INC., F/K/A THE  
WACKENHUT CORPORATION

<sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**EXHIBIT D**

**DOCKET SHEETS**

**CASE NOS. 12-CA-026644 and 12-CA-026811**

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## The Wackenhut Corporation d/b/a G4S

**Case Number:** 12-CA-026644**Date Filed:** 02/22/2010**Status:** Open**Location:** Palm Beach Gardens, FL**Region Assigned:** Region 12, Tampa, Florida

### Docket Activity

<u>Date</u>	<u>Document</u>	<u>Issued/Filed By</u>
10/21/2015	Brief to Court of Appeals	Petitioner
10/05/2015	Notice of Appearance - Court	Petitioner
10/02/2015	Certificate of Interested Parties	Petitioner
09/18/2015	Circuit Court Order	Court Petitioner
09/15/2015	Motion for Extension of Time EOT (Court only)	Petitioner
09/11/2015	Answer to Enforcement Application	Court Petitioner
09/10/2015	Circuit Court Filing	Court
09/03/2015	Circuit Court Filing	NLRB - GC
08/28/2015	Circuit Court Filing	Court
08/26/2015	Certificate of Interested Parties	NLRB - GC
<a href="#">1</a> <a href="#">2</a> <a href="#">3</a> <a href="#">4</a> <a href="#">5</a> <a href="#">6</a> <a href="#">7</a> <a href="#">next &gt;</a> <a href="#">last &gt;&gt;</a>		

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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	1155 Peachtree St NE Ste 1000	(404)586-1851
<i>Legal Representative</i>	Atlanta, GA	
Edward Cherof	30309-3630	
<i>Jackson Lewis P.C.</i>		
<b>Charged Party / Respondent</b>	1395 University Boulevard	(561)691-6582
<i>Legal Representative</i>	Jupiter, FL	
Fred Seleman	33458-5289	
<i>G4S SECURE SOLUTIONS (USA) INC.</i>		
<b>Charged Party / Respondent</b>	1155 Peachtree Street	(404)525-8200
<i>Legal Representative</i>	Ste 1000	
JONATHAN SPITZ	Atlanta, GA	
<i>Jackson Lewis P.C.</i>	30309-3630	



<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	450 East Las Olas Blvd., Ste 800	(954)525-4800
<i>Legal Representative</i>	Fort Lauderdale, FL	
PHILLIP MARCHION	33301-4202	
<i>Fisher &amp; Phillips, LLC</i>		

**Charging Party**

<b>Charged Party / Respondent</b>	4200 Wackenhut Dr # 100	(305)246-6723
<i>Employer</i>	West Palm Beach, FL	
THE WACKENHUT CORPORATION D/B/A G4S	33410-4242	

**Charging Party***Individual***Charging Party***Individual***Related Cases**

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
12-CA-026811	The Wackenhut Corporation d/b/a G4S Regulated Security Solutions	Open

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## The Wackenhut Corporation d/b/a G4S

**Case Number:** 12-CA-026644**Date Filed:** 02/22/2010**Status:** Open**Location:** Palm Beach Gardens, FL**Region Assigned:** Region 12, Tampa, Florida

### Docket Activity

<u>Date</u>	<u>Document</u>	<u>Issued/Filed By</u>
08/26/2015	Cross Application for Enforcement	NLRB - GC
08/12/2015	Notice of Appearance - Court	Petitioner
08/06/2015	Notice of Appearance - Court	NLRB - GC
08/06/2015	Notice of Appearance - Court	NLRB - GC
07/30/2015	Notice of Appearance - Court	NLRB - GC
07/23/2015	Circuit Court Filing	Court
07/23/2015	Petition for Review	Court Petitioner
06/25/2015	Board Decision	NLRB - Board
08/18/2014	Circuit Court Mandate*	Court
08/18/2014	Circuit Court Order*	Court

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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

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Edward Cherof	30309-3630	
<i>Jackson Lewis P.C.</i>		
<b>Charged Party / Respondent</b>	1395 University Boulevard	(561)691-6582
<i>Legal Representative</i>	Jupiter, FL	
Fred Seleman	33458-5289	
<i>G4S SECURE SOLUTIONS (USA) INC.</i>		
<b>Charged Party / Respondent</b>	1155 Peachtree Street	(404)525-8200
<i>Legal Representative</i>	Ste 1000	
JONATHAN SPITZ	Atlanta, GA	
<i>Jackson Lewis P.C.</i>	30309-3630	

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
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<i>Legal Representative</i>	Fort Lauderdale, FL	
PHILLIP MARCHION	33301-4202	
<i>Fisher &amp; Phillips, LLC</i>		

<u>Charging Party</u>	<u>Address</u>	<u>Phone</u>
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<i>Employer</i>	West Palm Beach, FL	
THE WACKENHUT CORPORATION D/B/A G4S	33410-4242	

**Charging Party**  
*Individual*

**Charging Party**  
*Individual*

## Related Cases

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
12-CA-026811	The Wackenhut Corporation d/b/a G4S Regulated Security Solutions	Open

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## The Wackenhut Corporation d/b/a G4S

**Case Number:** 12-CA-026644**Date Filed:** 02/22/2010**Status:** Open**Location:** Palm Beach Gardens, FL  
**Region Assigned:** Region 12, Tampa, Florida

### Docket Activity

<u>Date</u>	<u>Document</u>	<u>Issued/Filed By</u>
07/15/2014	Board Decision	NLRB - Board
06/30/2014	Motion to Dismiss to Court*	NLRB - GC
06/27/2014	Board Decision	NLRB - Board
05/13/2013	Petition for Review*	Court
04/30/2013	Board Decision	NLRB - Board
01/25/2013	Answering Brief to Cross Exceptions	Charged Party / Respondent
01/11/2013	Brief in Support of Cross Exceptions	Counsel for GC / Region
01/11/2013	Cross Exceptions	Counsel for GC / Region
01/11/2013	Answering Brief to Exceptions	Counsel for GC / Region
12/21/2012	Brief in Support of Exceptions	Charged Party / Respondent

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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b> <i>Legal Representative</i> Edward Cherof <i>Jackson Lewis P.C.</i>	1155 Peachtree St NE Ste 1000 Atlanta, GA 30309-3630	(404)586-1851
<b>Charged Party / Respondent</b> <i>Legal Representative</i> Fred Seleman <i>G4S SECURE SOLUTIONS (USA) INC.</i>	1395 University Boulevard Jupiter, FL 33458-5289	(561)691-6582
<b>Charged Party / Respondent</b> <i>Legal Representative</i> JONATHAN SPITZ <i>Jackson Lewis P.C.</i>	1155 Peachtree Street Ste 1000 Atlanta, GA 30309-3630	(404)525-8200

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	450 East Las Olas Blvd., Ste 800	(954)525-4800
<i>Legal Representative</i>	Fort Lauderdale, FL	
PHILLIP MARCHION	33301-4202	
<i>Fisher &amp; Phillips, LLC</i>		

**Charging Party**

<b>Charged Party / Respondent</b>	4200 Wackenhut Dr # 100	(305)246-6723
<i>Employer</i>	West Palm Beach, FL	
THE WACKENHUT CORPORATION D/B/A G4S	33410-4242	

**Charging Party***Individual***Charging Party***Individual***Related Cases**

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
12-CA-026811	The Wackenhut Corporation d/b/a G4S Regulated Security Solutions	Open

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## The Wackenhut Corporation d/b/a G4S

**Case Number:** 12-CA-026644**Date Filed:** 02/22/2010**Status:** Open**Location:** Palm Beach Gardens, FL  
**Region Assigned:** Region 12, Tampa, Florida

### Docket Activity

<u>Date</u>	<u>Document</u>	<u>Issued/Filed By</u>
12/21/2012	Exceptions to ALJD	Charged Party / Respondent
12/05/2012	EOT for Exceptions	NLRB - Board
12/04/2012	Motion	Employer
12/04/2012	Notice of Appearance	Employer
12/04/2012	Notice of Appearance	Employer
11/16/2012	Order Transferring Proceeding to the Board	NLRB - Board
11/16/2012	Administrative Law Judges Decision	NLRB - ALJ
09/28/2012	Board Decision	NLRB - Board
09/21/2011	Reply Brief	Counsel for GC / Region
09/07/2011	Brief in Support of the ALJs Decision	Charged Party / Respondent

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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	1155 Peachtree St NE Ste 1000	(404)586-1851
<i>Legal Representative</i>	Atlanta, GA	
Edward Cherof	30309-3630	
<i>Jackson Lewis P.C.</i>		
<b>Charged Party / Respondent</b>	1395 University Boulevard	(561)691-6582
<i>Legal Representative</i>	Jupiter, FL	
Fred Seleman	33458-5289	
<i>G4S SECURE SOLUTIONS (USA) INC.</i>		
<b>Charged Party / Respondent</b>	1155 Peachtree Street	(404)525-8200
<i>Legal Representative</i>	Ste 1000	
JONATHAN SPITZ	Atlanta, GA	
<i>Jackson Lewis P.C.</i>	30309-3630	

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<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b> <i>Legal Representative</i> PHILLIP MARCHION <i>Fisher &amp; Phillips, LLC</i>	450 East Las Olas Blvd., Ste 800 Fort Lauderdale, FL 33301-4202	(954)525-4800
<b>Charging Party</b>		
<b>Charged Party / Respondent</b> <i>Employer</i> THE WACKENHUT CORPORATION D/B/A G4S	4200 Wackenhut Dr # 100 West Palm Beach, FL 33410-4242	(305)246-6723
<b>Charging Party</b> <i>Individual</i>		
<b>Charging Party</b> <i>Individual</i>		

#### Related Cases

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
12-CA-026811	The Wackenhut Corporation d/b/a G4S Regulated Security Solutions	Open

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## The Wackenhut Corporation d/b/a G4S

Case Number: 12-CA-026644

Date Filed: 02/22/2010

Status: Open

Location: Palm Beach Gardens, FL

Region Assigned: Region 12, Tampa, Florida

### Docket Activity

Date	Document	Issued/Filed By
08/24/2011	Brief in Support of Exceptions	Counsel for GC / Region
08/24/2011	Exceptions to ALJD	Counsel for GC / Region
07/25/2011	Response to an Extension of Time Request	NLRB - Board
07/25/2011	RD Order*	NLRB - GC
07/21/2011	Request for an Extension of Time to File a Document	Counsel for GC / Region
07/12/2011	EOT for Exceptions or Cross Exceptions	NLRB - Board
06/27/2011	Order Transferring Proceeding to the Board	NLRB - Board
06/27/2011	Administrative Law Judges Decision	NLRB - ALJ
05/16/2011	Brief*	NLRB - GC
04/04/2011	RD Order to Reschedule Hearing*	NLRB - GC

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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

Participant	Address	Phone
<b>Charged Party / Respondent</b>	1155 Peachtree St NE Ste 1000	(404)586-1851
<i>Legal Representative</i>	Atlanta, GA	
Edward Cherof	30309-3630	
<i>Jackson Lewis P.C.</i>		
<b>Charged Party / Respondent</b>	1395 University Boulevard	(561)691-6582
<i>Legal Representative</i>	Jupiter, FL	
Fred Seleman	33458-5289	
<i>G4S SECURE SOLUTIONS (USA) INC.</i>		
<b>Charged Party / Respondent</b>	1155 Peachtree Street	(404)525-8200
<i>Legal Representative</i>	Ste 1000	
JONATHAN SPITZ	Atlanta, GA	
<i>Jackson Lewis P.C.</i>	30309-3630	

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<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	450 East Las Olas Blvd., Ste 800	(954)525-4800
<i>Legal Representative</i>	Fort Lauderdale, FL	
PHILLIP MARCHION	33301-4202	
<i>Fisher &amp; Phillips, LLC</i>		

**Charging Party**

<b>Charged Party / Respondent</b>	4200 Wackenhut Dr # 100	(305)246-6723
<i>Employer</i>	West Palm Beach, FL	
THE WACKENHUT CORPORATION D/B/A G4S	33410-4242	

**Charging Party***Individual***Charging Party***Individual***Related Cases**

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
12-CA-026811	The Wackenhut Corporation d/b/a G4S Regulated Security Solutions	Open

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## The Wackenhut Corporation d/b/a G4S

**Case Number:** 12-CA-026644**Date Filed:** 02/22/2010**Status:** Open**Location:** Palm Beach Gardens, FL  
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### Docket Activity

<u>Date</u>	<u>Document</u>	<u>Issued/Filed By</u>
03/31/2011	Answer to Complaint*	Charged Party / Respondent
03/22/2011	Complaint and Notice of Hearing*	NLRB - GC
03/18/2011	Complaint and Notice of Hearing*	NLRB - GC
03/14/2011	Informal Settlement Agreement*	NLRB - GC
03/08/2011	Answer to Complaint*	Charged Party / Respondent
01/27/2011	RD Order*	NLRB - GC
01/26/2011	RD Order*	NLRB - GC
01/14/2011	RD Order*	NLRB - GC
01/13/2011	RD Order*	NLRB - GC
12/29/2010	Complaint and Notice of Hearing*	NLRB - GC

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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	1155 Peachtree St NE Ste 1000	(404)586-1851
<i>Legal Representative</i>	Atlanta, GA	
Edward Cherof	30309-3630	
<i>Jackson Lewis P.C.</i>		
<b>Charged Party / Respondent</b>	1395 University Boulevard	(561)691-6582
<i>Legal Representative</i>	Jupiter, FL	
Fred Seleman	33458-5289	
<i>G4S SECURE SOLUTIONS (USA) INC.</i>		
<b>Charged Party / Respondent</b>	1155 Peachtree Street	(404)525-8200
<i>Legal Representative</i>	Ste 1000	
JONATHAN SPITZ	Atlanta, GA	
<i>Jackson Lewis P.C.</i>	30309-3630	

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<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	450 East Las Olas Blvd., Ste 800	(954)525-4800
<i>Legal Representative</i>	Fort Lauderdale, FL	
PHILLIP MARCHION	33301-4202	
<i>Fisher &amp; Phillips, LLC</i>		

**Charging Party**

<b>Charged Party / Respondent</b>	4200 Wackenhut Dr # 100	(305)246-6723
<i>Employer</i>	West Palm Beach, FL	
THE WACKENHUT CORPORATION D/B/A G4S	33410-4242	

**Charging Party***Individual***Charging Party***Individual***Related Cases**

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
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## The Wackenhut Corporation d/b/a G4S

**Case Number:** 12-CA-026644**Date Filed:** 02/22/2010**Status:** Open**Location:** Palm Beach Gardens, FL**Region Assigned:** Region 12, Tampa, Florida

### Docket Activity

<u>Date</u>	<u>Document</u>	<u>Issued/Filed By</u>
12/28/2010	Complaint and Notice of Hearing*	NLRB - GC
10/21/2010	Informal Settlement Agreement*	NLRB - GC
10/21/2010	Informal Settlement Agreement*	NLRB - GC
10/01/2010	Abeyance Letter*	NLRB - GC
10/01/2010	Abeyance Letter*	NLRB - GC
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### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	1155 Peachtree St NE Ste 1000	(404)586-1851
<i>Legal Representative</i>	Atlanta, GA	
Edward Cherof	30309-3630	
<i>Jackson Lewis P.C.</i>		
<b>Charged Party / Respondent</b>	1395 University Boulevard	(561)691-6582
<i>Legal Representative</i>	Jupiter, FL	
Fred Seleman	33458-5289	
<i>G4S SECURE SOLUTIONS (USA) INC.</i>		
<b>Charged Party / Respondent</b>	1155 Peachtree Street	(404)525-8200
<i>Legal Representative</i>	Ste 1000	
JONATHAN SPITZ	Atlanta, GA	
<i>Jackson Lewis P.C.</i>	30309-3630	
<b>Charged Party / Respondent</b>	450 East Las Olas Blvd., Ste 800	(954)525-4800
<i>Legal Representative</i>	Fort Lauderdale, FL	
PHILLIP MARCHION	33301-4202	
<i>Fisher &amp; Phillips, LLC</i>		
<b>Charging Party</b>		
<b>Charged Party / Respondent</b>	4200 Wackenhut Dr # 100	(305)246-6723
<i>Employer</i>	West Palm Beach, FL	

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<u>Participant</u>	<u>Address</u>	<u>Phone</u>
THE WACKENHUT CORPORATION D/B/A G4S	33410-4242	
<b>Charging Party</b> Individual		
<b>Charging Party</b> Individual		

#### Related Cases

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12-CA-026811	The Wackenhut Corporation d/b/a G4S Regulated Security Solutions	Open

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## The Wackenhut Corporation d/b/a G4S Regulated Security Solutions

**Case Number:** 12-CA-026811**Date Filed:** 07/29/2010**Status:** Open**Location:** Palm Beach Gardens, FL**Region Assigned:** Region 12, Tampa, Florida

### Docket Activity

No docket activity found

### Allegations

- 8(a)(1) Concerted Activities (Retaliation, Discharge, Discipline)

### Participants

<u>Participant</u>	<u>Address</u>	<u>Phone</u>
<b>Charged Party / Respondent</b>	1155 Peachtree St NE Ste	(404)586-
<i>Legal Representative</i>	1000	1851
Edward Cherof	Atlanta, GA	
Jackson Lewis P.C.	30309-3630	
<b>Charged Party / Respondent</b>	PO Box 109603	(561)691-
<i>Legal Representative</i>	Palm Beach Gardens, FL	6582
Fred Seleman	33410-9603	
G4S REGULATED SECURITY SOLUTIONS		
<b>Charged Party / Respondent</b>	PO Box 109603	(305)246-
<i>Employer</i>	Palm Beach Gardens, FL	6723
THE WACKENHUT CORPORATION D/B/A G4S REGULATED SECURITY SOLUTIONS	33410-9603	
<b>Charging Party</b>	16900 SW 105th Ave	(305)756-
<i>Additional Service</i>	Miami, FL	0226
	33157-4186	
<b>Charging Party</b>		
<i>Individual</i>		

### Related Cases

<u>Case Number</u>	<u>Case Name</u>	<u>Status</u>
12-CA-026644	The Wackenhut Corporation d/b/a G4S	Open

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EXHIBIT E

EXCERPTS, TRANSCRIPT OF HEARING  
APRIL 4-6, 2011  
CASE NOS. 12-CA-026644 and 12-CA-026811



BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION 12

In the Matter of:

G4S REGULATED SECURITY SOLUTIONS,  
A DIVISION OF G4S SECURE  
SOLUTIONS (USA) INC., f/k/a THE  
WACKENHUT CORPORATION,

Respondent,

and

THOMAS FRAZIER, an Individual,  
CECIL MACK, an Individual,

Charging Parties.

Case No. 12-CA-26644  
12-CA-26811

The above-entitled matter came on for hearing pursuant to notice, before **WILLIAM N. CATES**, Associate Chief Judge, at the **National Labor Relations Board, 51 S.W. First Avenue, Miami, Florida 33130**, on **Monday, April 4, 2011**, at **10:00 a.m.**

A P P E A R A N C E S

**Counsel for the Acting General Counsel:**

SHELLEY B. PLASS  
National Labor Relations Board  
Region 12  
51 S.W. First Avenue, Room 1320  
Miami, Florida 33130  
(305) 536-5391

**On Behalf of the Employer:**

FRED SELEMAN, Managing Counsel, Labor Relations  
G4S Secure Solutions (USA) Inc.  
1395 University Boulevard  
Jupiter, Florida 33458  
(561) 691-6582

1 MR. SELEMAN: No objection, Your Honor.

2 JUDGE CATES: I will receive, without objection,  
3 General Counsel Exhibit 32, which is an 18-page exhibit,  
4 which purports to have been extracted from the 2009 contract  
5 between Florida Power & Light Company and the Company  
6 herein.

7 **(General Counsel's Exhibit 32 received into evidence.)**

8 Q. BY MS. PLASS: When does the current contract expire  
9 with FPL?

10 A. I believe December 31st of 2011.

11 Q. In February of 2010 did the Respondent begin a  
12 leadership effectiveness review of its supervisors at Turkey  
13 Point?

14 A. Yes.

15 Q. And you conducted that leadership effectiveness review  
16 along with other managers, correct?

17 A. Correct.

18 Q. The other managers were Karen Macdonald --

19 A. Correct.

20 Q. -- and Juan Rodriguez?

21 A. Correct.

22 Q. As part of that leadership review process, the security  
23 officers had to complete a 360-degree leadership feedback  
24 tool in February of 2010, correct?

25 A. Correct.

1 Q. And that 360-degree tool was given to the security  
2 officers to assess the performance of the lieutenants on  
3 their shift, correct?

4 A. Correct.

5 Q. There was also a management development questionnaire  
6 used in this leadership review process, right?

7 A. Correct.

8 Q. Management development questionnaires were completed in  
9 2010 or rather in 2009, right?

10 A. I believe that's accurate.

11 Q. You observed the lieutenants as part of this leadership  
12 review process?

13 A. Yes.

14 Q. You documented your observations?

15 A. Not all documented.

16 Q. I'm sorry; I can't hear you.

17 A. Not all documented.

18 Q. And what form did you use to document your observations?

19 A. It would be if I did observations out in the field.

20 Q. And did you use a particular form for noting your  
21 observations?

22 A. If I did, it would be on the -- it's called the security  
23 fundamentals observation.

24 Q. Is that the name of the document or the form that is  
25 used?

1 Q. Who compiled the information and put it into this  
2 report?

3 A. The leadership development manager.

4 Q. And who would that be?

5 A. Karen Macdonald.

6 Q. Did she also type it?

7 A. I believe so, yes.

8 Q. When did she prepare it, if you know?

9 A. Don't recall the exact date.

10 Q. Were you present when she prepared this review?

11 A. I was involved in the process.

12 Q. On the second page of this document there's some  
13 signatures. Do you recognize the signatures?

14 A. I do.

15 Q. Whose are they?

16 A. Mine at the top; the Operations Coordinator Juan  
17 Rodriguez; and the Leadership Development Manager Karen  
18 Macdonald.

19 Q. The decision to discharge Frazier was a joint decision  
20 made by you, Mareth, and Macdonald?

21 A. I actually am the one that makes the discharge  
22 recommendation.

23 Q. So you made the recommendation?

24 A. (No audible response.)

25 Q. And who --



1 JUDGE CATES: You need to verbally answer.  
2 THE WITNESS: Okay. Ask the question again, please?  
3 Q. BY MS. PLASS: Did you make a recommendation?  
4 A. I made the recommendation, yes.  
5 Q. And your recommendation was to terminate his employment?  
6 A. Correct.  
7 Q. And that recommendation was based upon the information  
8 from the management development questionnaire?  
9 A. Correct.  
10 Q. And from the 360-degree tool?  
11 A. Correct.  
12 Q. And who made the final decision?  
13 A. Ray Cogdell.  
14 Q. And just --  
15 JUDGE CATES: Spell his last name, if you know.  
16 THE WITNESS: Yes, C-o-g-d as in Delta, e as in Echo,  
17 l-l.  
18 Q. BY MS. PLASS: And who does he work for?  
19 A. G4S Regulated Security Solution (US) Inc.  
20 Q. What is his position?  
21 A. He's the company vice president for the nuclear side.  
22 Q. When did you submit your recommendation?  
23 A. I don't know the specific date.  
24 Q. It was in February of 2010?  
25 A. Yes, I believe so.

1 A. I do recognize them and yes, we did refer to them.

2 Q. And did you rely on the information that's contained in  
3 it?

4 A. Yes.

5 Q. Based on the information that you gathered from the 360-  
6 leadership feedback tools and the management development  
7 questionnaire, it was determined that Mr. Mack had failed  
8 his leadership effectiveness review as well, correct?

9 A. Correct.

10 **(General Counsel's Exhibit 13 marked for identification.)**

11 Q. BY MS. PLASS: I'm going to show you what's been marked  
12 as General Counsel's Exhibit Number 13. Who compiled the  
13 information on this report for Mr. Mack in General Counsel's  
14 Number 13?

15 A. As far as putting the report together or all the data  
16 that went into it?

17 Q. Who put all of the data together to prepare the report?

18 A. Karen Macdonald.

19 Q. And who typed the report?

20 A. Karen Macdonald.

21 Q. Do you know when she prepared this report?

22 A. Based on the date, I would say February 9th  
23 approximately.

24 Q. Did you provide a recommendation with respect to the  
25 information you had gathered on Mr. Mack's effectiveness as

1 a leader?

2 A. Yes.

3 Q. What was your recommendation?

4 A. Termination.

5 Q. When did you make the recommendation to terminate his  
6 employment?

7 A. I'd have to see the specific document to validate the  
8 date, but it would have been in this timeframe.

9 Q. On the second page of this document, it's a two-page  
10 document there are signatures. Whose signatures appear on  
11 that page?

12 A. The top one is my signature. The second signature is  
13 Juan Rodriguez, the Operations Coordinator; and the third  
14 signature, Leadership Development Manager, is Karen  
15 Macdonald.

16 Q. Who made the final decision with respect to Mr. Mack's  
17 employment, continued employment?

18 A. Ray Cogdell.

19 Q. You mentioned that you would need to see a document in  
20 order to remember the date when you made the recommendation  
21 to terminate Mr. Mack's employment. What is the name of  
22 that document?

23 A. It's an employee termination review.

24 Q. Would that be in Mr. Mack's personnel file?

25 A. Not necessarily.

1 A. Correct.

2 MS. PLASS: Your Honor, I'd like to offer General  
3 Counsel's Exhibit Number 28.

4 MR. SELEMAN: No objection.

5 JUDGE CATES: Am I to believe only that part relating  
6 to Mr. Frazier?

7 MS. PLASS: Yes, Your Honor.

8 JUDGE CATES: Okay. With that, I will receive General  
9 Counsel 28, a one-page exhibit.

10 **(General Counsel's Exhibit 28 received into evidence.)**

11 JUDGE CATES: You may continue.

12 MS. PLASS: Your Honor, that's all the questions that I  
13 have at this time of this witness.

14 JUDGE CATES: Do you wish to question this witness now,  
15 or do you wish to call him in your case-in-chief? You may  
16 do both if you wish, but I'll restrict you that I don't want  
17 to hear the same questions twice. And if you question him  
18 now, since he's aligned with the party you represent, it  
19 would have to be in the nature of direct questions.

20 MR. SELEMAN: Understood, Your Honor.

21 **CROSS-EXAMINATION**

22 Q. BY MR. SELEMAN: Mr. Mareth, you were asked some  
23 questions about owner-controlled access and protected area.  
24 Just to clarify, the idea of what is called protected,  
25 that's not the only area for which our company provides

1 security services, correct?

2 A. Correct.

3 Q. Is it true that all of the thousands of acres that  
4 Florida Power & Light owns at that facility is protected by  
5 the Company's security?

6 A. Correct. We provide -- we have -- without going into  
7 detail, we have assigned patrols to protect the owner-  
8 controlled area. We have personnel that are in the  
9 protected area and responsible for vital area as well.

10 Q. Are you familiar with every detail contained in the  
11 contract, in the appendix, and the attachments to the  
12 contracts between the Company and FPL since you started in  
13 2008?

14 A. Every detail, probably not.

15 Q. If any security fundamental observations were performed  
16 relative to Mr. Frazier, would you expect them be contained  
17 in his personnel file?

18 A. Would you read that again, please, sir, or ask that  
19 again?

20 Q. If any security fundamental observations were done for  
21 Mr. Frazier, would you expect them to be contained in his  
22 personnel file?

23 A. No, they're not contained in the personnel files.

24 Q. Where would they be located?

25 A. There's a -- FPL maintains security observations. We



1 Q. And does that include those officers who worked on the  
2 overtime or were --

3 A. No, those were assigned to Bravo team.

4 Q. Regular assigned?

5 A. Regular officer, yes, ma'am.

6 Q. You performed the evaluations of the security officers  
7 on your team?

8 A. No, ma'am. My lieutenants are assigned to do the One on  
9 One's for their prospective officers.

10 Q. Did you perform One on One evaluations for the  
11 lieutenants?

12 A. Yes, ma'am.

13 Q. What did you do -- strike that.

14 And on the One on One's you included information or  
15 observations for that review period, right?

16 A. That is correct.

17 Q. If there were any problems, you would identify them  
18 for -- to Mr. Rodriguez?

19 A. I would identify them on the One on One, and that One on  
20 One is shared with -- to Mr. Rodriguez, yes, ma'am.

21 Q. Did you also receive the evaluations that the  
22 lieutenants gave you?

23 A. From their officers, yes, ma'am.

24 Q. From the officers. And would you discuss those  
25 evaluations with the security officers as well?

1 A. Not necessarily, ma'am, not if the officers don't have  
2 any concerns with their evaluations, no.

3 Q. I'm going to show you what's been received into evidence  
4 as Number 9, General Counsel's Exhibit Number 9 -- sorry --  
5 Number 10.

6 **(Whereupon, the document was handed to the witness.)**

7 Q. BY MS. PLASS: Is this the One on One that you  
8 performed for Mr. Frazier on December 20th of 2009?

9 A. Yes, ma'am.

10 Q. And if you would look at General Counsel's Exhibit  
11 Number 15, that would be the One on One that you prepared  
12 for Mr. Mack on December 20 -- well, on what date?

13 A. It says here December 21, '09.

14 Q. And these evaluations are used in connection with  
15 promotions or awards?

16 A. No, ma'am, those are normal One on One's that we do on a  
17 monthly basis and then I do a yearly evaluation.

18 Q. And you performed the yearly or annual evaluations for  
19 Mr. Frazier and Mr. Mack as well, correct?

20 A. Yes, ma'am.

21 Q. I'm going to show you what's in evidence as General  
22 Counsel's Exhibit 8 and General Counsel's Exhibit 14.

23 **(Whereupon, the document was handed to the witness.)**

24 Q. BY MS. PLASS: Beginning with Exhibit 8, this is the  
25 review for Mr. Frazier at the end of the year 2009, correct?

1 A. Yes, sir, based on the amount of overtime posts that we  
2 have to properly defend the plant, compensatory posts for  
3 regulatory reasons. We require an additional amount of  
4 officers to fill those slots, so based on those numbers, we  
5 call or we ask for overtime officers.

6 Q. Is it unusual that there be more than 39 officers on the  
7 B team back in February 2010 on a given day?

8 A. No, sir.

9 Q. Approximately how many security officers would have been  
10 on the team on any given day?

11 A. Once again, depending on the amount of required posts  
12 that we have for that day, or for -- it could be 47  
13 officers, it could be 46. Without looking at my shift  
14 report for that day, I wouldn't -- I couldn't give you a  
15 right number.

16 Q. Are you generally involved in the One on One's that  
17 lieutenants perform relative to the security officers?

18 A. No, sir. They perform their One on One's on their own.  
19 They present it to their officers. If the officers have any  
20 questions or any debate on their One on One's, I have an  
21 open door policy.

22 The officer will come to me and they'll dispute, hey, I  
23 don't agree with this evaluation. And I'll get with the  
24 respective lieutenant for that officer and we'll talk about  
25 it and we'll try to accommodate the right -- the right

1 evaluation for that officer based on his record, based on  
2 his summary, based on attendance, based on whatever the  
3 record shows for that period of time for that evaluation.

4 Q. When you say evaluation, are you referring to the One on  
5 One's or the performance objective and development plan or  
6 both?

7 A. Both. The evaluation for that period is the One on One  
8 or the quarterly One on One's.

9 Q. If you'd please take a look at a document marked General  
10 Counsel Number 15 in front of you? If you'd please look  
11 under the section Topics to be Discussed and tell us what's  
12 meant by the language that appears after that?

13 A. The Topics to be Discussed, encourage, re-enforcement, a  
14 culture that invites open, honest feedback, act positively  
15 on feedback.

16 Q. What does that all mean?

17 A. That means that you have an honest -- an open  
18 relationship with your officers. I have an open  
19 relationship with my lieutenants. I have an honest feedback  
20 to that lieutenant as far as his One on One. Everything is  
21 documented in the review section. Everything is documented  
22 under the task assigned for that period so there's an  
23 honest, open door policy that I have for that.

24 Q. Did you view it as part of Mr. Frazier's responsibility  
25 to act positively on the feedback he received from his

1 officers?

2 A. Yes, sir. I encourage -- to all my lieutenants, I  
3 encourage that they have an open, honest relationship with  
4 their officers. Treat everybody with respect the way that  
5 you would want to be treated. That's my model, and I feed  
6 on that model.

7 Q. Do you think it's enough for your lieutenants to simply  
8 relay complaints and issues on behalf of the officers that  
9 report to them?

10 MS. PLASS: Objection, Your Honor, leading.

11 JUDGE CATES: Well, it's --

12 MS. PLASS: And it asks for opinion.

13 JUDGE CATES: It asks for a conclusion that you -- you  
14 can ask him questions that elicit answers, and then I can  
15 draw the conclusion of whether it does or does not establish  
16 something. So on that basis I sustain her objection.

17 Q. BY MR. SELEMAN: What do you expect your lieutenants to  
18 do when their officers complain to them about something?

19 A. I expect for the lieutenant to give me feedback. If it  
20 requires actions to be taken as far as if it's a safety  
21 issue, we act on it immediately. We have a corrective  
22 actions program that we have in place that we write  
23 condition reports.

24 Right now it changed to -- it's called an AR system that  
25 we write reports on the issues or the complaint, and we



1 bring those issues up to management whether it be the FPL  
2 side of the house or my supervision, and we try to -- we try  
3 to handle that complaint or that situation accordingly.

4 And we stress on if it's a safety concern or if it's a  
5 housekeeping concern or any -- whatever the concern is, we  
6 give it high priority and we try to respond back the  
7 quickest we can.

8 Q. Are there ever any occasions where you expect  
9 lieutenants under your command to try to do something to  
10 respond to complaints raised by their officers?

11 A. If the -- I expect for my lieutenants to respond as  
12 quickly as possible to the concern, to the officer's  
13 concern. If it's immediate actions taken, I expect my  
14 lieutenants to take immediate actions and handle the  
15 situation accordingly.

16 MR. SELEMAN: Nothing further, Your Honor.

17 MS. PLASS: I have a few questions.

18 JUDGE CATES: You may if they were raised by his  
19 examination.

20 MS. PLASS: Yes, Your Honor.

21 **REDIRECT EXAMINATION**

22 Q. BY MS. PLASS: With respect to the expectations that  
23 you mentioned, the security officers are also held to the  
24 same expectations with respect to bringing concerns to  
25 management as well, correct?

1 A. I reviewed the charts, the leadership effectiveness  
2 chart, SCWE -- I'm sorry, I don't recall all the material,  
3 but the leadership effectiveness review list. I did review  
4 that.

5 Q. And did you discuss your testimony with any others in  
6 management before testifying today?

7 A. No.

8 Q. When were you hired by G4S?

9 A. My start date was February 16th, 2009.

10 Q. Did you have any other work that you performed at Turkey  
11 Point relative to the security guard force?

12 A. No.

13 Q. Prior to that time? What is your position there?

14 A. I'm no longer at Turkey Point.

15 Q. Where are you located now?

16 A. I'm now in Jupiter, and I'm vice president of training.

17 Q. And when were you working at Turkey Point, what was the  
18 period of time that you were there?

19 A. From February 16th through January 30th of 2011.

20 Q. What was your position in that time period?

21 A. Leadership Development Manager.

22 Q. So you were involved in implementing the leadership  
23 effectiveness program?

24 A. Yes.

25 Q. Is that a yes?

1 JUDGE CATES: You need to verbally answer.

2 THE WITNESS: Yes. I said yes.

3 JUDGE CATES: Keep your voice up. That doesn't  
4 amplify. It only records, so keep your voice up.

5 THE WITNESS: Yes.

6 Q. BY MS. PLASS: That program was started in 2010,  
7 February of 2010?

8 A. I don't remember the exact start date.

9 Q. Well, it ended in July of 2010. Is there a set period  
10 of time in which it was to be implemented and --

11 JUDGE CATES: Well, ask her a question instead of  
12 telling her. Just like did it end in July? If she has a  
13 question, then she can answer it.

14 Q. BY MS. PLASS: Did it end in July 2010?

15 A. The first round ended in 2010, but I now understand it's  
16 part of a yearly -- or we just did -- they just did another  
17 one a few weeks ago. So I think it will be an annual  
18 exercise.

19 Q. It only lasts for a short period of time within the  
20 year?

21 A. Yes.

22 Q. And in the program that you -- that was in effect in  
23 2010, the individuals who fell within the bottom 20 percent  
24 of the group were to be evaluated further?

25 A. Yes.

1 effectiveness program --

2 A. Yes.

3 Q. -- correct?

4 A. Yes.

5 Q. Okay. You were involved in making the decisions with  
6 respect to what action to take, if any, with respect to each  
7 one of them, correct?

8 A. Not in the decision, no.

9 Q. Well, did you make a recommendation?

10 A. Yes.

11 Q. Do you know the name of the lieutenant or the individual  
12 who was demoted as a result of their performance on the  
13 leadership effectiveness program in 2010?

14 A. No.

15 Q. Do you know how many people were in that position?

16 A. No.

17 Q. But you know there were demotions and there was at least  
18 one person on a PIP?

19 MR. SELEMAN: Objection, asked and answered. She said  
20 she didn't know.

21 JUDGE CATES: I sustain the objection.

22 Q. BY MS. PLASS: There were demotions as a result of this  
23 program in 2010, correct?

24 A. Yes.

25 Q. And Mr. Mack and Mr. Frazier were among those

1 individuals who were discharged or terminated as a result of  
2 their poor performance, correct?

3 A. Mr. Frazier was.

4 Q. Mr. Frazier was fired because of his poor performance on  
5 the leadership effectiveness program?

6 A. Correct.

7 Q. And Mr. Mack, Cecil Mack, was also fired because of his  
8 poor performance on the leadership effectiveness program in  
9 2010?

10 A. Not due to just that reason.

11 Q. So it was for that reason -- that was one of the  
12 reasons?

13 A. Yes.

14 Q. How do you know that? You were involved with the  
15 decision?

16 A. No, I was not involved with the decision. I was  
17 involved in the analysis and the write-up.

18 Q. The analysis phase of this evaluation process involved  
19 you meeting with Mr. Rodriguez and Mr. Mareth to discuss the  
20 information that you gathered on these individuals?

21 A. Yes.

22 Q. And you reviewed information from their MDQs, correct?

23 A. Yes.

24 Q. And --

25 JUDGE CATES: And what do you understand MDQ to mean?

1 THE WITNESS: Management Development Questionnaire.

2 MS. PLASS: Thank you.

3 Q. BY MS. PLASS: You also reviewed the comments and  
4 information supplied by security officers on the 360-degree  
5 tool?

6 A. Yes.

7 Q. And based on that information, that's where you came up  
8 with your recommendations with respect to each person,  
9 correct?

10 A. Yes, that was part of it.

11 Q. And then after the analysis came what? What was the  
12 next step in the process?

13 A. After the analysis, the scores were put in and further  
14 discussed with Mr. Rodriguez and Mr. Mareth and finalized.

15 Q. And you were involved in that process as well?

16 A. Yes.

17 Q. Okay. And based on those scores, Mr. Frazier and  
18 Mr. Mack failed the review, the effectiveness review?

19 A. Failed? You mean they were at the bottom percentage?

20 Q. What -- how did you perceive their performance compared  
21 to the other people who were --

22 A. They were in the lower percentage, yes.

23 Q. Did you document your analysis or how it is you came to  
24 make a recommendation with respect to Mr. Mack or  
25 Mr. Frazier?



1 A. Not to my recollection, no.

2 Q. In fact, is that part of the process?

3 A. No.

4 JUDGE CATES: Do you have other questions? She's ready  
5 for them.

6 MS. PLASS: No questions at this time, Your Honor.

7 JUDGE CATES: Do you wish to examine the witness now or  
8 later or both?

9 MR. SELEMAN: Now, Your Honor.

10 JUDGE CATES: Very well.

11 **CROSS-EXAMINATION**

12 Q. BY MR. SELEMAN: Would you please tell us about your  
13 professional background?

14 A. I have a doctorate in strategic leadership development  
15 and a master's in organizational leadership, and I've been  
16 in the practical field for over 20 years.

17 Q. Does the acronym SCWE, S-C-W-E, mean anything to you?

18 A. Yes, Safety Conscious Work Environment.

19 Q. And generally speaking, would you please tell us what  
20 SCWE is?

21 A. SCWE is a mechanism that is so incredibly important to  
22 raise concerns, raise issues regarding industrial safety  
23 and/or nuclear safety.

24 Q. Did you have any role, in your position at Turkey Point,  
25 in soliciting or addressing issues raised by officers?

1 A. Yes. Through SCWE, through open door, through come into  
2 my office and talk, all those mechanisms, yes.

3 Q. How about issues raised by supervisors?

4 A. Absolutely.

5 MS. PLASS: Your Honor, I object to the areas that  
6 we're covering here as beyond the scope, but you know, I did  
7 not discuss these things.

8 JUDGE CATES: Well, in the greater scheme of things,  
9 you have asked her how she went about dealing with the  
10 employees and also dealing with the lieutenants and other  
11 people. And also counsel has promised that this is round  
12 one and the final round with this witness, so I'm going to  
13 allow him to continue.

14 MS. PLASS: If I have the opportunity to redirect in  
15 these areas then?

16 JUDGE CATES: You have not been forbidden so far, and I  
17 wouldn't anticipate this being the occasion.

18 MS. PLASS: Okay.

19 Q. BY MR. SELEMAN: You were just asked about issues  
20 raised by supervisors. Did that category include  
21 lieutenants?

22 A. Yes.

23 Q. Did a --

24 A. And captains.

25 Q. Did a point in time come when you were part of

1 SCWE stands for and things of that sort. So let that be a  
2 guidance for you if you need further guidance.

3 Do you have any other questions of this witness?

4 MR. SELEMAN: Yes, Your Honor.

5 JUDGE CATES: You may ask.

6 Q. BY MR. SELEMAN: During your time at Turkey Point, did  
7 the lieutenants receive any training that the security  
8 officers did not receive?

9 A. Yes. In fact, they received One on One discussions.  
10 After our five-week training, initial training for the teams  
11 plus the lieutenants, they then had a week long with me, I  
12 believe from September to January 2010, two solid weeks, so  
13 80-hours per shift. At that time there were five shifts.

14 Q. What was the purpose of that training?

15 A. To give them leadership development. To not only talk  
16 about SCWE, but talk about presentation skills and how to  
17 communicate, interpersonal skills, the things that I believe  
18 that were part of my job to bring to them.

19 Q. Was there somebody employed as Leadership Development  
20 Manager at Turkey Point prior to you?

21 A. No, sir, there were -- I was the first.

22 Q. Do you know why you were hired into that position at  
23 Turkey Point?

24 A. Yes, because our client felt that the folks who were  
25 currently supervisors and the ones coming up needed more

1 professional development.

2 Q. Did a point in time come when the Company decided to do  
3 something further in terms of developing its managers?

4 A. I'm thinking of the leadership effectiveness review, but  
5 I'm not sure if that's what you're referring to. So the  
6 leadership effectiveness review was to look at the group of  
7 supervisors and say let's top all the way to bottom. Is it  
8 sticking, in other words. Is the leadership development  
9 program working to improve the skill level?

10 **(Employer's Exhibit 35 marked for identification.)**

11 Q. BY MR. SELEMAN: I show you what has been marked as  
12 Employer Exhibit 35. Please let me know if you recognize  
13 this document?

14 A. (Reviews document.) Yes, those are our marching orders  
15 to implement the program.

16 Q. How did this document come to your attention?

17 A. It came in two ways. One, via e-mail, and then we had a  
18 phone conversation with the corporate RSS people to talk  
19 through it and implement it.

20 Q. Do you know was this program put in place just for  
21 Turkey Point?

22 A. No, it was all throughout Florida Power & Light fleet.

23 Q. And what was the next step that you took or what did you  
24 do next after you obtained this document?

25 A. Mike and I reviewed it and we --

1 documents of which voir dire is for that purpose.

2 MS. PLASS: Right.

3 JUDGE CATES: And you may ask those at this time.

4 MS. PLASS: Okay. Well, I'm also prepared to give you  
5 my position with respect to the documents in general before  
6 voir dire.

7 JUDGE CATES: Well, if you give me your position before  
8 voir dire, then I will eliminate voir dire.

9 MS. PLASS: Okay. Let me ask voir dire then.

10 **VOIR DIRE EXAMINATION**

11 Q. BY MS. PLASS: Dr. Macdonald, these documents you say  
12 were prepared when? There's no date on them so I'm --

13 A. It's part of the leadership effectiveness review  
14 process, so someplace the end of January, beginning of  
15 February we began the review. It took, to go through all  
16 the people, it took some time to go through that.

17 Q. And do you have --

18 JUDGE CATES: Now, what year are you talking about,  
19 January to February of what year?

20 THE WITNESS: I'm sorry, sir. 2010.

21 JUDGE CATES: Okay.

22 Q. BY MS. PLASS: There are no signatures on this  
23 document.

24 A. Correct. It's an Excel spreadsheet to do the analysis.

25 Q. Where did it come from?

1 A. It came from corporate. It was attached to the three or  
2 four sheets that we looked at earlier.

3 Q. Which three or four sheets?

4 A. Those were the rules on how to implement the program.  
5 So the rules and the spreadsheet were attached.

6 Q. Would that be the exhibit that was received as  
7 Respondent's Exhibit --

8 JUDGE CATES: Keep your voice up so all those can hear  
9 you.

10 THE WITNESS: This one right here.

11 JUDGE CATES: What number is it on the bottom there,  
12 ma'am? Take a look.

13 THE WITNESS: 35.

14 JUDGE CATES: 35 she's making reference to, four page  
15 Leadership Effectiveness Program document.

16 MS. PLASS: I'm not seeing my copy of that exhibit.

17 JUDGE CATES: All right. Off the record.

18 (Off the record.)

19 JUDGE CATES: On the record.

20 Government counsel, if you have voir dire of the  
21 witness --

22 MS. PLASS: Yes, I do.

23 JUDGE CATES: -- you may do so now.

24 MS. PLASS: Okay.

25 Q. BY MS. PLASS: So these pages, 195 pages were attached



1 to Respondent's Exhibit Number 35?

2 A. No. The attachment was five sheets. They were blank,  
3 and then we had to take the Excel spreadsheets and fill them  
4 out with name and whatever score.

5 Q. And who is we? You are referring to which people filled  
6 this out?

7 A. Mike Mareth, myself, and Juan Rodriguez.

8 Q. And who typed in the score information for each of these  
9 individuals?

10 A. I did.

11 Q. And you don't remember when you did that?

12 A. It was around the end of January, early February of  
13 2010. With that many people, it would take some time to do  
14 all that work.

15 Q. Now, it seems that most of these people have more than  
16 one page, more than one score sheet.

17 A. Yes. Everybody got the same score sheets. I believe  
18 there are five.

19 Q. And you inserted information under the section,  
20 midsection that says Note Completion of Criteria and  
21 Comments that Support Score. Did you put that information  
22 in there on -- for example, if you look at Page 4 of Charles  
23 Feldman.

24 A. Correct. Those just had numbers.

25 Q. No, there are some that have notations or some typed

1 commentary. Look at Page 4 of Charles Feldman, who's a  
2 captain.

3 A. In his case, there was a notation because he had a very  
4 high score.

5 Q. And is that your notation? Did you insert that  
6 information?

7 A. Yes, those are my words.

8 MS. PLASS: Now, there are other people where there are  
9 comments or notations made, and there are 195 pages here to  
10 go through. Your Honor, I haven't found the most relevant  
11 ones at this point still yet and so to expect a productive  
12 voir dire at this point is -- I need time to even locate the  
13 two individuals at issue in this case, Mr. Frazier and  
14 Mr. Mack. I haven't found theirs, if there's one that  
15 exists.

16 MR. SELEMAN: They're in there. I think they're in the  
17 bottom. And all these were produced in response to the  
18 subpoena. This isn't -- you know.

19 MS. PLASS: I understand.

20 MR. SELEMAN: Okay.

21 MS. PLASS: Documents were supplied last night at 5:00  
22 p.m., Your Honor, and as you can see they're here so --

23 JUDGE CATES: There's no need to debate the issue.  
24 I'll give you time to examine it. I'm here for the full  
25 week. I cancelled my Detroit appearance, so you all can

1 work just as slowly as I'll allow you to, and we'll see  
2 where we're at at the end of the day.

3 So I will defer ruling on this document until such time  
4 as the Government tells me she's had an opportunity to  
5 review it.

6 Do you have any other questions of this witness?

7 MR. SELEMAN: Yes, Your Honor.

8 JUDGE CATES: You may ask.

9 **CROSS-EXAMINATION (cont.)**

10 Q. BY MR. SELEMAN: What did you do after these reviews  
11 were completed?

12 A. After the initial reviews were completed, the Excel  
13 spreadsheet generates a document of the top to bottom scores  
14 in a color format, green, yellow, and red. And from that, I  
15 spoke with Mr. Michael Mareth and Mr. Juan Rodriguez about  
16 next steps.

17 **(Employer's Exhibit 40 marked for identification.)**

18 Q. BY MR. SELEMAN: I show you what's been marked as  
19 Employer Exhibit 40, these two pages. It's a two-page  
20 exhibit.

21 A. Yes, I'm familiar with this document.

22 Q. And what did this document show with respect to  
23 Mr. Frazier?

24 A. That Mr. Frazier was the last person on the list with  
25 the lowest score.

1 Q. And what did this document show with respect to  
2 Mr. Mack?

3 A. And Mr. Mack was third -- I'm sorry, I can't really see  
4 the red with the black, but it looks like it's 36 and 38.

5 MR. SELEMAN: I would move for the introduction of  
6 Employer's Exhibit 40.

7 JUDGE CATES: I will defer ruling on that because if I  
8 understand the witness' testimony, this was generated  
9 spreadsheet-wise from the scores and content in Employer  
10 Exhibit 36. So I wouldn't ask her to go on Employer's  
11 Exhibit 40 until she's had an opportunity to analyze  
12 Employer's Exhibit 36.

13 So I will defer ruling on 36 and also 40, and it will be  
14 your burden, Employer counsel, to re-offer them. And I  
15 will, in the morning if she hasn't completed before then, I  
16 will in the morning tell her or ask her if she's completed.  
17 And if she's not, I'll consider that she has completed  
18 reviewing the documents.

19 You may continue.

20 Q. BY MR. SELEMAN: What action did you take next as part  
21 of the leadership effectiveness program?

22 A. I did the one to two-page summaries to specifically  
23 spell out what we had discussed and put it in paper, just  
24 documenting our discussions.

25 Q. Would you please take a look at what's been marked as

1 General Counsel Exhibit Number 7?

2 **(Whereupon, the document was handed to the witness.)**

3 A. Yes. That is the document I was referring to as a one-  
4 page summary.

5 Q. And if you'd please take a look at General Counsel  
6 Exhibit Number 13?

7 JUDGE CATES: Well, actually, GC-7 is as it is in its  
8 current form in the record a two-page because it's a front  
9 and back.

10 Okay. Go ahead and look at 15.

11 Q. BY MR. SELEMAN: GC-13, please.

12 **(Whereupon, the document was handed to the witness.)**

13 JUDGE CATES: 13.

14 THE WITNESS: Yes, I prepared both of these as a  
15 summary to our discussion.

16 Q. BY MR. SELEMAN: Did you complete these summaries for  
17 anybody else?

18 A. No.

19 **(Employer's Exhibit 41 marked for identification.)**

20 Q. BY MR. SELEMAN: I'm showing you what's been marked as  
21 Employer Exhibit 41. Would you please look through these  
22 pages and let me know if you recognize this document?

23 A. Yes, this is the same process we used for other  
24 terminations where I would do a one to two-page summary.

25 MR. SELEMAN: No further questions.

1 Q. And when did you, along with Mr. Rodriguez, and  
2 Mr. Mareth, put this information in the Score column for  
3 each of these individuals?

4 A. We talked about it. We went through it.

5 Q. The question is when did you do it?

6 A. When. End of January, beginning of February is my best  
7 recollection.

8 Q. Okay.

9 JUDGE CATES: Of what year?

10 Q. BY MS. PLASS: Of what year?

11 A. I'm sorry. 2010.

12 Q. And can you be more specific as to when at the end of  
13 January and beginning of February that you prepared these  
14 scores?

15 A. I don't remember the exact date. It was shortly after  
16 we got the marching orders from corporate with the  
17 instructions on how to complete the forms. I started  
18 immediately.

19 Q. And who from corporate supplied information on the  
20 instructions on how to complete these forms?

21 A. The instructions came from Nancy Breutsce, who was my  
22 boss; Ray Cogdell, who was her boss; and they put together  
23 the spreadsheet, so it came from corporate to Turkey Point.

24 Q. Could you spell the last name of Ms. Breutsce?

25 A. B-r-e-u or u-e -- e-u-t-s-c-e.



1 A. Turkey Point Nuclear Plant in Florida City, Florida.

2 Q. When were you hired to work there?

3 A. May 18th, 1989.

4 Q. What was the position you held when you were first  
5 hired?

6 A. Security officer.

7 Q. What were your duties as a security officer?

8 A. To protect the plant for radiological sabotage by  
9 conducting patrols, standing guard at posts, static posts.  
10 It at one point included fire watch duties, fire watch  
11 patrols, checking doors, checking equipment, responding in  
12 contingency, doing vehicle patrols in the owner-controlled  
13 areas, working in the various entry gates, searching  
14 personnel, searching materials, searching vehicles,  
15 preventing unauthorized personnel materials from entering  
16 the plant.

17 Q. Were there any additional duties that you've performed  
18 as a security officer?

19 A. We would make reports if we saw something unusual to the  
20 captains or the lieutenants. We would -- of course if there  
21 was something unusual, we would immediately post ourselves,  
22 like if there was a breach in a barrier or in a fence. We  
23 would -- gosh -- we -- anything in accordance to the SFI,  
24 the procedures that we use.

25 Q. What does the SFI stand for?

1 security emergency.

2 Q. Were there any changes to your work after you became a  
3 CAS/SAS, Central Alarm Station and secondary alarm station  
4 operator?

5 A. I'm sorry, repeat the question?

6 Q. Were there any changes to your work after you assumed  
7 the CAS and SAS functions as well?

8 A. Not as a -- no, not as a security officer, except for  
9 what I just mentioned when I became certified as a CAS/SAS  
10 operator. Those additional duties, but all other security  
11 officer duties remained the same.

12 Q. Did your position change at any point in time?

13 A. When I became a lieutenant, it's changed slightly, yes.

14 Q. And when did you become a lieutenant?

15 A. The latter part of 2003, September/October 2003.

16 Q. In September 2003, your position changed?

17 A. That's correct.

18 Q. As a lieutenant, what shift did you work on?

19 A. I worked on the B team.

20 Q. For how long did you work on the B team?

21 A. For approximately seven years.

22 Q. What were the hours of the B team?

23 A. From 5:40 in the morning until 6:00 p.m. in the evening.

24 Q. You worked on the B team for four or five years until  
25 when?

1 reactors are shut down, the containment building is opened,  
2 the reactor hand is removed, and new fuel is added into the  
3 reactor.

4 At that time, also major maintenance is performed on the  
5 various systems throughout the plant while the unit is not  
6 in operation.

7 Q. So the teams have names. You mentioned the Bravo team,  
8 the B team; and the Echo team, and what are the other teams?

9 A. The Alpha team, which is also another -- the opposing  
10 dayshift team; and then the C and D team, Charlie and Delta  
11 team, which are the two alternating nightshift teams.

12 Q. What were your duties as a lieutenant?

13 A. My duties as a lieutenant included ensuring that  
14 qualified security officers are manning the various posts,  
15 qualified in the SFI. The SFI states the qualifications  
16 that you must have to be at a certain post or patrol or  
17 perhaps in the entry building.

18 Q. And for the record, SFI refers to again?

19 A. Security Force Instructions.

20 Q. Thank you.

21 A. I -- my duties also included to verify the paperwork,  
22 the general purpose log and the post or patrol entry, that  
23 it was correct, that it was filled out correctly, ensure  
24 that the officers were alert, attentive, are aware of their  
25 assigned duties as set forth by the general purpose log and

1 the SFIs.

2 Ensure that their equipment was in proper working order  
3 and not damaged or been tampered with. Ensure that they  
4 were working in a safe and clean environment. Ensure that  
5 they were conducting their patrols according to the SFIs.  
6 Ensure that they were posted according to their SFIs.

7 Ensure that there were no safety issues in the area that  
8 may affect their patrol or their post. I would do  
9 inventories of the equipment at the various posts. I would  
10 make sure the officers knew their responsibility at the  
11 various posts.

12 Q. With respect to the inventories, what would you use in  
13 connection with that, if anything?

14 A. The inven -- there's inventory sheets that go along with  
15 each post and patrol, and there's also inventory sheets at  
16 the response center and the central and secondary alarm  
17 stations. Our OCA lieutenant also has an inventory sheet.

18 Basically, on an inventory sheet you're accounting for  
19 various things like documents, keys, weapons -- documents,  
20 keys, weapons, even like fire extinguishers. We would also  
21 make sure that the officers filled out their inventory  
22 sheets properly because it --

23 Q. Now, you mentioned -- oh, I'm sorry, go ahead.

24 A. Yeah, because each officer has an inventory sheet as  
25 well to go along with their post.

1 A. Sometimes before briefing. Sometimes when I was working  
2 in the power block or out in the OCA, throughout the day. I  
3 mean at various times.

4 Q. And during what period of time did you bring up issues  
5 at daily briefings?

6 A. Well, I've been bringing up issues to management ever  
7 since I started working out there over 20 years ago. I've  
8 never had a problem speaking to management, bringing up  
9 concerns that needed to be addressed, and so it continued  
10 throughout my entire tenure at Turkey Point.

11 Q. And up until when were you bringing up your concerns at  
12 daily briefings?

13 A. Up until I was terminated in February 2010.

14 Q. Who were the security officers that spoke to you about  
15 the concerns that they had most frequently?

16 A. Well, a lot of times -- okay, who were they? Well,  
17 Mr. Reigada, at one time asked me to bring up some concerns.  
18 Tim Lambert asked me to bring up some concerns.  
19 Mr. Stanford came to me, I believe, once. Mr. Santiago came  
20 to me once. I think Mr. Moran came to me one time about  
21 something.

22 But a lot of times, officers when you're sitting  
23 together as a group collectively in the response center, for  
24 example, there would be a lot of chatter or talk about  
25 different issues that officers had.

1 JUDGE CATES: She didn't ask you to read it. She just  
2 asked you if you recognized it.

3 THE WITNESS: Yes.

4 Q. BY MS. PLASS: Do you recognize it?

5 A. I recognize both documents.

6 Q. Okay. Thank you. You mentioned condition reports. Are  
7 they also referred to as CRs?

8 A. That's correct.

9 Q. What types of issues are covered by condition reports?

10 A. Condition reports are a plant-wide document, or way of  
11 resolving issues and documenting these issues and passing  
12 them along to making management, upper management, FPL  
13 management and also Wackenhut manager or I guess the  
14 different departments that the concern may address -- aware  
15 of the issues.

16 It is a document that I believe is -- initially goes to  
17 FPL management and then they determine what department will  
18 then handle the issue.

19 Q. What type of issues are covered in the condition  
20 reports?

21 A. Any kind of issues from maintenance on equipment or  
22 defective equipment to concerns that employees system-wide  
23 may have at Turkey Point Nuclear Power Plant to include any  
24 of the concerns that I may have had in the past.

25 Q. How long have these condition reports been in use, if



1 Q. BY MS. PLASS: As a lieutenant, what would you do, if  
2 anything, if a security officer violated a policy or  
3 procedure in the SFI, or in any other procedural manual  
4 that's --

5 A. Well, it would depend on the severity of the offense.  
6 It could be a coaching, or it could be some sort of a  
7 reprimand.

8 Q. Did you coach any security officer as a lieutenant?

9 A. Yes.

10 Q. On what types of issues?

11 A. Being -- sometimes it was a paperwork issue ensuring  
12 that the officers properly filled out their paperwork,  
13 ensuring -- maybe being a -- appearing to be a little more  
14 vigilant in an area where they might be posted. It was an  
15 appearance issue.

16 Maybe I would ask an officer to stand a little closer to  
17 an open door or sit up straight instead of slouching down in  
18 their chair, something like that.

19 Q. Those things you actually did do?

20 A. Yes.

21 Q. And is coaching -- what is coaching considered to be?

22 A. It's just bringing -- it's peer checking. It's letting  
23 the officer -- or reminding the officer that hey, you know,  
24 you need to do it in this manner because that's the way it's  
25 written in the SFI, or that's the expectation of management.

1 (Whereupon, Ms. Plass reviewed her notes.)

2 Q. BY MS. PLASS: And the period that you served as a  
3 lieutenant, did you evaluate any guards?

4 A. Yes.

5 Q. And which security guards did you evaluate?

6 A. I evaluated Rebecca Bradford, Jeff Santiago, Warren  
7 Mincey, German Santamaria, and I think that was it, maybe  
8 one more.

9 Q. And when did you begin to perform the evaluations of  
10 these security officers?

11 A. About two years prior to my discharge.

12 Q. Who evaluated these security officers before that time?

13 A. At one point, the captains were doing all the  
14 evaluations, but I think the One on One process started  
15 approximately two years prior to my discharge.

16 Q. Who told you that you were to begin these evaluations?

17 A. The captains.

18 Q. You mentioned the One on One. What is that?

19 A. It's a quarterly review of the security officer's  
20 objectives, the things that the officer may need improvement  
21 on, perhaps attendance or communication or knowledge of the  
22 Security Force Instructions, something like that.

23 Q. And you described another type of evaluation and what  
24 was that?

25 A. We have an annual evaluation as well.

1 Q. Is that called the annual evaluation?

2 A. Annual performance appraisal or something like that. I  
3 don't remember the name.

4 Q. And who did you perform that evaluation for?

5 A. On the same individuals.

6 Q. The same security officers?

7 A. Yes.

8 Q. That you did for the quarterly?

9 A. Quarterly, that's correct.

10 Q. What did you do with the quarterly and the annual  
11 evaluations after completing them?

12 A. I gave them to the captain or directly to Juan  
13 Rodriguez.

14 Q. Did you do -- was there any conversation with any other  
15 individuals pertaining to those evaluations before you gave  
16 it to the captain or Mr. Rodriguez?

17 A. Sometimes I would go to the captain if I was evaluating  
18 an individual to discuss the evaluation and make him aware  
19 of what was in there in case the officer came back and was  
20 questioning it.

21 Q. Was there any review with these security officers of  
22 their evaluations?

23 A. Yes.

24 Q. Who performed the review?

25 A. I would present the review for the officer to look over

1 and discuss if they wanted to. I would also discuss the  
2 review with them and ask them if they had anything else to  
3 input with their evaluation and then they would sign it.

4 Q. After they signed their evaluation, what did you do with  
5 it?

6 A. I gave it to Juan Rodriguez or the captain.

7 Q. So that we understand the order of this process, at what  
8 point would you first show these evaluations to the shift  
9 captain or Mr. Rodriguez?

10 A. Sometimes I would show the captain the evaluation first  
11 to confer with him, if it was appropriate. And other times,  
12 I would just present to him the completed evaluation.

13 Q. What were the evaluations that you performed used for?

14 A. As far as I know, only to improve the deficiencies that  
15 the officers may have or improve the -- maybe they weren't  
16 even deficiencies, maybe they were just, you know, gaining a  
17 better understanding of the SFIs.

18 Q. Did you make any recommendations in connection with  
19 these evaluations?

20 A. Sometimes.

21 Q. What were the recommendations about?

22 A. Encourage the officer to become a better officer.

23 Encourage the officer to maybe have been attendance.

24 Encourage the officer to study the Security Force

25 Instructions. Encourage the officer to be -- gain more

1 your evaluations that were given to you that you were  
2 responsible for developing employees through job coaching,  
3 mentoring, and performance feedback?

4 A. That is correct in accordance to the SFIs and other  
5 procedures and policies, yes.

6 Q. Did you understand that it was part of your  
7 responsibility to encourage or re-enforce a culture that  
8 invited open, honest feedback?

9 MS. PLASS: Your Honor, I would object to him reading a  
10 document and not showing it to --

11 JUDGE CATES: He's asking him questions that are  
12 pertinent or pertinent to the extent I will not cut him off.  
13 As to his duties and performance, you raised it quite at  
14 length with him, so I'll allow him to ask the question.

15 THE WITNESS: Ask the question again, please?

16 Q. BY MR. SELEMAN: Did you understand that your  
17 responsibilities included encouraging and reinforcing a  
18 culture that invited open and honest feedback?

19 A. That is correct. Everybody is encouraged to do that.

20 Q. Did you understand that your responsibilities as  
21 lieutenant included acting positively on that feedback?

22 A. Everyone is encouraged to do that, security officers  
23 included.

24 Q. So that's a yes?

25 A. Yes.

1 Q. Do you understand that your responsibilities included  
2 promoting the use of a corrective action program?

3 A. Yes, everyone is encouraged to do that.

4 Q. Now, you're not suggesting that the things that I just  
5 listed from an evaluation completed for you were the same as  
6 the things in an evaluation that you completed for the  
7 officers that reported to you, are you?

8 MS. PLASS: Your Honor, I'd object to the form of the  
9 question.

10 JUDGE CATES: Sustained.

11 **(Employer's Exhibit 4 marked for identification.)**

12 Q. BY MR. SELEMAN: I'm showing you an 83-page document  
13 which is marked as Employer Exhibit 4. Would you please  
14 take a moment to flip through these pages and let me know if  
15 you recognize these documents?

16 Are these various evaluations on One on One forms that  
17 you completed relative to the officers under your command?

18 A. That is correct.

19 Q. When you were promoted to lieutenant, you received a pay  
20 raise, correct?

21 A. That is correct.

22 Q. And as a lieutenant, you received more in life insurance  
23 benefit than the security officers under your command?

24 MS. PLASS: Objection, Your Honor, calls for hearsay.

25 JUDGE CATES: How does it call for hearsay whether he

1 received -- he can say I didn't, I didn't know, but he can  
2 certainly ask him whether he received an increase in life  
3 insurance.

4 MS. PLASS: But it's with respect to what other  
5 security officers received.

6 JUDGE CATES: Well, he said that he started out as a  
7 security officer. I'll allow him to at least compare it to  
8 his own situation.

9 THE WITNESS: Yes.

10 Q. BY MR. SELEMAN: Is it correct that at times you could  
11 be responsible for as many as 20 officers on your shift?

12 A. Directing in accordance with the SFIs, yes.

13 Q. Were there occasions where the lieutenants and the  
14 captain would be instructed to meet with Mike Mareth or Juan  
15 Rodriguez without the security officers present?

16 A. Yes.

17 Q. Is it true that as much as perhaps once a month such a  
18 meeting would take place?

19 A. That is incorrect.

20 Q. Approximately how often would such a meeting take place?

21 A. Maybe -- maybe two or three times a -- four times a year  
22 maybe.

23 Q. So there were occasions where lieutenants and captains  
24 were part of some sort of meeting where security officers  
25 were not present, correct?



1 A. That's correct.

2 Q. And lieutenants and captains were part of training  
3 sessions where security officers were not present, correct?

4 A. That is correct on occasion.

5 Q. And security officers were present for certain training  
6 sessions where lieutenants and captains were not present,  
7 correct?

8 A. That is correct.

9 Q. Are some posts better than other posts?

10 A. That is an objective question.

11 Q. Let me rephrase that. Do you believe that from the  
12 perspective of at least some security officers, some posts  
13 are better than other posts?

14 A. Yes. Some security officers prefer some posts over  
15 other posts, that is correct.

16 Q. And you had authority to transfer security officers from  
17 one post to another during shift under some circumstances,  
18 correct?

19 A. After requesting approval from the -- or conferring and  
20 requesting approval from the captain, that is correct.

21 JUDGE CATES: You have to label it and show it to --  
22 you don't have to offer it, but nothing should be given to a  
23 witness maybe other than a drink of water of --

24 MR. SELEMAN: Understand, Your Honor.

25 MR. SELEMAN: I'd like to show him a copy of his

1 affidavit.

2 **(Whereupon, Mr. Seleman showed a document to Ms. Plass.)**

3 JUDGE CATES: What are you going to label it? Pick a  
4 high number, Employer's 1000.

5 **(Employer's Exhibit 1000 marked for identification.)**

6 Q. BY MR. SELEMAN: I'm showing you what's been marked as  
7 Employer's Exhibit 1000.

8 A. Okay.

9 Q. Do you recognize this document?

10 A. Yes, that's my affidavit.

11 Q. And I'd ask you to take a look at Page 4, Lines 5  
12 through 8.

13 JUDGE CATES: Read that to yourself and tell us when  
14 you've done so and then he'll ask you --

15 THE WITNESS: Okay.

16 JUDGE CATES: -- if he has any questions.

17 THE WITNESS: (Reviews document.) Okay.

18 JUDGE CATES: Have you concluded reading it?

19 THE WITNESS: Yes.

20 JUDGE CATES: And now if he has a question, he'll ask  
21 you.

22 Q. BY MR. SELEMAN: So was it true that you have the  
23 authority to transfer a security officer from one post to  
24 another on your shift for operational needs as you stated in  
25 your statement?

1 evaluations were not used for promotion. They were used  
2 just to promote the -- or get the officer to improve his  
3 performance. I do not know if it was used in the evaluation  
4 to promote.

5 Q. I'm showing you again what has been marked as Employer  
6 Exhibit 1000. Would you please take a moment and look back  
7 at Line 6 and 7?

8 JUDGE CATES: On which Page?

9 MR. SELEMAN: Page 5, Your Honor.

10 JUDGE CATES: All right.

11 THE WITNESS: Okay. May not, okay.

12 Q. BY MR. SELEMAN: Does that refresh your recollection  
13 that if somebody continually received a bad review, they  
14 might not be considered for a promotion?

15 A. They may not be considered for a promotion; that's  
16 correct.

17 Q. Isn't it true that you used independent judgment if  
18 somebody came to you and asked for support in connection  
19 with a particular shift schedule?

20 A. That is not -- that is not true directly. Usually I  
21 would confer with the captain.

22 Q. I ask you to look at Page 5 again on Employer's Exhibit  
23 1000. Would you please read the last three sentences, the  
24 last three lines, 22 through 24?

25 JUDGE CATES: To yourself and tell us when you've

1 things on the computers at the site that the security  
2 officers do not, correct?

3 A. That is correct.

4 Q. The lieutenant position existed before you were promoted  
5 lieutenant; is that right?

6 A. That is correct.

7 Q. Now, you talked about a number of issues that you raised  
8 with management through the years. You're not suggesting  
9 that every single one of these, some officer came to you and  
10 said would you please bring that up with upper management,  
11 are you?

12 A. I'm not suggesting that, no.

13 Q. But you are suggesting there were occasions where that  
14 happened?

15 A. There were many occasions.

16 Q. Are you aware that the Company has attempted to resolve  
17 some of those issues that you raised through the years?

18 A. That is correct.

19 Q. And you admit that part of your responsibilities were to  
20 bring issues raised by your offices to the attention of  
21 somebody else, correct?

22 A. It is everybody's responsibility, security officers  
23 included, to bring to the attention questions and concerns  
24 to management or lieutenants or the captains.

25 Q. But everything funnels up, correct? The officers can

1 counsel or Company counsel, but I will allow him to respond  
2 to your question, but I'm -- you'd have to tell me in brief  
3 how his answer would impact my writing this decision.

4 I have allowed some on either side that I think to  
5 myself perhaps that's not as important as it could be, but I  
6 haven't stopped anybody yet, but consider that guidance for  
7 whatever it's worth. I will, at some point, hand down  
8 clearer rulings.

9 Consider no question before you, Mr. Witness.

10 Counsel, you have no question before the witness. You  
11 may frame your next question.

12 Q. BY MR. SELEMAN: Mr. Frazier, do you admit that part of  
13 your responsibilities as a lieutenant were to try to resolve  
14 issues that were brought to your attention by security  
15 officers under your command?

16 A. I believe that that is part of my nature, part of --  
17 yes, part of the responsibility of a lieutenant to bring  
18 to -- to funnel up issues.

19 Q. Now, in addition to funneling up, do you believe it was  
20 part of your responsibilities as a lieutenant that if a  
21 security officer brought an issue to your attention that was  
22 something that you believed you personally could do  
23 something about, that you had a responsibility to try to do  
24 that, to try to resolve the issue?

25 A. Within the context of what the SFI allows me to do.

1 Timothy Lambert.

2 JUDGE CATES: Sir, watch the wires on the floor.

3 MR. LAMBERT: Yes, sir.

4 JUDGE CATES: Raise your right hand.

5 (Whereupon,

6 **TIMOTHY LAMBERT**

7 was called as a witness by and on behalf of the General  
8 Counsel and, having been first duly sworn, was examined and  
9 testified on his oath, as follows:)

10 JUDGE CATES: Please have a seat. If you have any  
11 documents with you, would you please lay those aside?

12 THE WITNESS: Yes, sir.

13 JUDGE CATES: State your name and address for the  
14 record and please spell your last name?

15 THE WITNESS: My name is Timothy Lambert,  
16 L-a-m-b-e-r-t. I live at 9822 S.W. 196th Street in Miami,  
17 Florida, zip code 33157.

18 JUDGE CATES: I ask everyone to spell their last name  
19 for the benefit of the Court Reporter.

20 Government counsel, you may question the witness.

21 **DIRECT EXAMINATION**

22 Q. BY MS. PLASS: Mr. Lambert, are you here pursuant to a  
23 subpoena?

24 A. Yes, ma'am.

25 Q. Which company do you work for?

1 many pages?

2 MS. PLASS: It consists of -- I'm sorry, Your Honor --  
3 10 pages, Your Honor.

4 JUDGE CATES: And what was the second one you wanted me  
5 to consider?

6 MS. PLASS: The second is the --

7 JUDGE CATES: You've labeled it?

8 MS. PLASS: It's all one composite exhibit because it's  
9 all pertaining to the same case, so it's all GC-3, DD&E with  
10 the order with the Cert of Rep.

11 JUDGE CATES: And the total package is 10 pages?

12 MS. PLASS: Yes, Your Honor.

13 JUDGE CATES: Let me see what it is you're talking  
14 about.

15 **(Whereupon, Ms. Plass handed the document to Judge Cates.)**

16 JUDGE CATES: Now, is this somehow supposed to be  
17 binding on me in deciding this case?

18 MS. PLASS: No, Your Honor, but if you wish to take  
19 judicial notice of it, it's something that is relevant in  
20 terms of the history of this facility and the employees at  
21 this facility. And one of the issues is the type of work  
22 being performed at the facility. And, of course, that  
23 means --

24 JUDGE CATES: Well, the work being performed  
25 specifically to the case before me is whether or not



1 opportunity because it's just us, but sometimes over the  
2 phone.

3 Q. And what did you discuss with Frazier and Mack?

4 A. All sorts of things at the plant, safety issues,  
5 hygiene, various things that we were trying to look for an  
6 improvement on for postings, patrols.

7 Q. Can you be more specific?

8 A. Well, as far as hygiene issues go, we had brought up in  
9 the briefings -- I had, I know, many, many times and not  
10 gotten any resolution about cleaning supplies. We have very  
11 difficult access to cleaning supplies, paper towels, things,  
12 you know, cleaning solutions.

13 And when you bring it up over and over and didn't get  
14 any assistance, I knew if I called Tom or Cecil, if they  
15 were in my area, depending on which one it was, that they  
16 would do whatever they could to get those items provided to  
17 people.

18 Also equipment issues. If we had a security officer  
19 that was posted in a position where it was in the sun or no  
20 water, we knew Cecil and Tom would come to their aid. If  
21 there was any issues that we had with patrols, you know, we  
22 had a couple of patrols that were very difficult. Any issue  
23 that we couldn't get solved, we knew that Cecil and Tom  
24 would assist us.

25 Q. And what would you do if you couldn't get it resolved?

1 process.

2 Q. And when did you begin to approach them about the issues  
3 of -- the timeframe of approaching them about issues? Can  
4 you tell us?

5 A. As long as I've known them and they were supervisors, I  
6 could -- I mean I went to them because they cared about what  
7 was going on there. I meant I went to them because they  
8 cared about what was going on there. I mean they were two  
9 excellent supervisors that really cared about the  
10 operations.

11 And I could go to them about issues. People -- I get a  
12 lot of people calling me because they're afraid to go to  
13 management or they're afraid to go up the chain of command  
14 or to put themselves out for some reason. They felt --

15 JUDGE CATES: Listen carefully to the question.

16 THE WITNESS: Okay. Yes, sir.

17 JUDGE CATES: She only asked you when it started.

18 THE WITNESS: Oh, I'm sorry. Oh, that was '03, from  
19 '03, 2003.

20 Q. BY MS. PLASS: Now, as a security officer now can --  
21 has the condition reporting process changed at all for you?

22 A. It has improved dramatically. We have consoles, which  
23 are available to us, albeit they are still in areas that --  
24 like for the briefing room, public areas basically.

25 There's -- you know, we don't have a computer called

1 security officers' computer, but we have consoles available  
2 to us and we have our own log-in. So now we can log on to  
3 the computers, but during their tenure, we had no -- we  
4 could not log on without a supervisor or without someone who  
5 had access.

6 Q. And what types of issues, if any, did you raise to  
7 Frazier or Mack in connection with filing of a condition  
8 report?

9 A. They're numerous. Equipment issues --

10 Q. What did you go to them for?

11 A. Oh, me personally?

12 Q. Yes, yes.

13 A. Equipment issues.

14 Q. Such as what?

15 A. Such as our ballistic vests. We got a lot of equipment  
16 that we have to wear, and it was totally inappropriate for  
17 our environment. We have a unique environment. Do you want  
18 me to go into detail or should I -- I'm sorry.

19 Q. No, that's --

20 JUDGE CATES: Just -- she -- listen carefully.

21 THE WITNESS: Yes, sir.

22 JUDGE CATES: She's asked you what subject matters did  
23 you raise.

24 THE WITNESS: Yes.

25 JUDGE CATES: She didn't ask you why you raised them.

1 A. No, sir, I don't believe so.

2 Q. Not possible. You know every single thing that a  
3 lieutenant does on a daily basis?

4 A. Probably not everything, but 99 percent.

5 Q. As a security officer, you report directly to the  
6 lieutenant who's in charge of your group of regular reports,  
7 correct?

8 A. That would be my first line of reporting, yes.

9 Q. Yes, your first line of supervision, correct?

10 A. Yes.

11 Q. I mean earlier you testified that security officers  
12 report directly to the captain. That's not quite accurate;  
13 the officers report directly to the lieutenants?

14 A. Our orders come from the captain every --

15 Q. I understand, but that's not my question. All security  
16 officers report directly to a lieutenant, correct? That is  
17 to whom they report directly. That is the person directly  
18 above them in the chain of command, correct?

19 A. Depending on the issue, for the most part that is  
20 correct.

21 Q. On a daily basis, during your shift as a security  
22 officer, you report directly to a lieutenant, correct?

23 I understand there's people above the lieutenant in the  
24 chain of command --

25 A. Not a specific lieutenant, no, sir. I don't have a

1 witness.

2 MS. PLASS: Yes, sir.

3 **DIRECT EXAMINATION**

4 Q. BY MS. PLASS: Mr. Mack, before February 15th of 2010,  
5 who did you work for?

6 A. WNS, which was Wackenhut. The name was G4S Regulated  
7 Security.

8 Q. Where were you employed?

9 A. At Turkey Point Nuclear facility.

10 Q. When were you hired?

11 A. On June 2003.

12 Q. I'm sorry, which year?

13 A. June 2003 -- sorry, 2002.

14 Q. What was the name of the Company when you were hired?

15 A. Wackenhut.

16 Q. And what positions did you hold during your employment  
17 at Turkey Point?

18 A. Initially, I was part-time. I was assigned to the OCA,  
19 owner controlled area, then I lateralled over to the Central  
20 Alarm Station officer.

21 Q. And when were you moved into the Central Alarm Station  
22 office?

23 A. Probably around a year and a half, maybe a year and a  
24 half prior to me getting fired.

25 Q. And what happened -- how long were you in that position?

1 A. The same, same period of time.

2 Q. And did you continue to work in just that position as  
3 a -- I'm sorry, as a security officer in the CAS Office?

4 A. Correct.

5 Q. Until when?

6 A. Until September of 2003.

7 Q. And what happened in September of 2003?

8 A. I was promoted to lieutenant and it was posted. I  
9 applied for it. I was interviewed and tested.

10 Q. And what were your duties when you -- as a lieutenant?

11 A. With addition to the same CAS/SAS duties or Central  
12 Alarm Station duties as a security officer, I also set to  
13 make sure officers were fit for duty. I also checked  
14 license. Also routinely checked posts, monitored the IDS,  
15 the intrusion devices. I also -- that's about it.

16 Q. Okay. And before you were separated or discharged on  
17 February 15th of 2010, who was your immediate supervisor?

18 A. Quintin Ferrer.

19 Q. Which shift did you work on?

20 A. Day shift, Bravo team.

21 Q. And how long were you assigned to the Bravo team?

22 A. For two years prior to me getting discharged. Say two,  
23 three years.

24 Q. Which ranks in the security guard force did you have  
25 daily contact with as a lieutenant?

1 Q. You did. What issues did Mr. Lambert discuss with you?

2 A. Lambert mainly discussed the attendance policy and also  
3 the load bearing vest, you know, about being hot. By being  
4 hot, your core temperature at times could reach over 100  
5 degrees, you know. And especially when you're doing patrols  
6 and certain security tasks, that's a very hot safety  
7 concern.

8 Q. Now, when -- how often, should I say, would you bring up  
9 issues during the daily shift briefings, in what period of  
10 time?

11 A. At the end of the briefings maybe, let's say, around  
12 twice a week.

13 Q. And up until what point in time did you raise these  
14 issues at briefings?

15 A. Up until I got terminated.

16 Q. Was there a time that you recall when you began to do  
17 this?

18 A. As soon as I became a lieutenant because I was raising  
19 issues as an officer also. I mean issues are ongoing  
20 things, and it has to be addressed.

21 Q. And did you mention were there any other lieutenants who  
22 spoke out during the shift briefings about concerns raised  
23 by security officers?

24 A. Yes. We all spoke out, but mainly in particular myself,  
25 Frazier, and Milspaugh.



1 A. 1109 was -- it was a document that had everything that  
2 the officer needed, or had, and also all the contents of the  
3 BBRE.

4 Q. And as a lieutenant, did you review the work of security  
5 officers?

6 A. Meaning?

7 Q. Did you evaluate them?

8 A. Yes, I did.

9 Q. Which security officers did you evaluate?

10 A. Nadia Torres -- there were six of them. Nadia Torres,  
11 Delmission, Tania Mayberry, Joe McGovern -- I just drew a  
12 blank. I can't think of the last one -- oh, Officer Donato.

13 Q. Who told you to perform the evaluations?

14 A. It was assigned by the shift captain.

15 Q. For how long did you evaluate these security officers?

16 A. It was two years prior.

17 Q. Were you told what the purpose of your evaluations would  
18 be?

19 A. Yeah. It was mainly to set goals for the officer.

20 Q. How often would you evaluate them?

21 A. Quarterly and yearly.

22 Q. When did you begin to evaluate them, if I didn't ask  
23 that already?

24 A. Yes. It was two years prior.

25 Q. And what did you do after you completed the evaluation?

1 A. I went over it with them, and I turned it into the  
2 captain once it was done.

3 Q. After you turned it over to the captain, was there any  
4 discussion with the captain over what was contained in each  
5 evaluation?

6 A. Yes and no. Normally -- normally if the eval was  
7 something that actually needed to get addressed, yes, and  
8 otherwise no.

9 Q. And what types of things would you discuss?

10 A. Mainly attendance policies.

11 Q. Pardon me?

12 A. Mainly attendance issues and that their performance was  
13 pretty much on line.

14 Q. Are you aware of any action that may have been taken  
15 against the security officer as a result of your  
16 evaluations?

17 A. As a direct result of the violation? No.

18 Q. Are you familiar with the progressive discipline  
19 policies of the Employer?

20 A. Yes, I am.

21 Q. As a lieutenant, did you have an occasion to be involved  
22 with issuing discipline to security officers?

23 A. Yes. Typically, the way it worked, pursuant to the  
24 policy we would -- the captain would issue the reprimand and  
25 depending on what lieutenant was in the area that the

1 **(Employer's Exhibit 8 marked for identification.)**

2 Q. And I'm asking you to take a look at what's been marked  
3 as Employer Exhibit 8, a two-page document, and let me know  
4 if you recognize that document?

5 A. And read it, correct?

6 Q. Yes.

7 A. Yes.

8 Q. And is that, at the bottom of the second page next to  
9 rank/position, is that your handwriting there?

10 A. That is correct.

11 Q. So you wrote in supervisor?

12 A. That was the title, yes.

13 Q. So your title at the time was supervisor?

14 A. My title was lieutenant.

15 Q. But you wrote in supervisor.

16 A. That's what the Company deemed us as.

17 **(Employer's Exhibit 9 marked for identification.)**

18 Q. BY MR. SELEMAN: If you'd please take a look at the  
19 document that's been marked as Employer Exhibit 9? Do you  
20 recognize this document?

21 A. Correct.

22 Q. Is that your signature on the fourth page?

23 A. That is correct.

24 Q. Were you ever presented with a document like this to  
25 review and sign before you were a lieutenant?

1 involved with security in general?

2 A. 28 years.

3 Q. How long have you been involved with security in the  
4 nuclear industry?

5 A. 28 years.

6 Q. What does the Company do at the Turkey Point facility?

7 A. We're a contracted security organization. We provide  
8 services at that -- at Turkey Point that include protection  
9 for the owner-controlled area, protected area, the vital  
10 areas. Our ultimate goal is to protect against radiological  
11 sabotage and we also provide -- we provide compliance to our  
12 physical security plan, which is a document that's governed  
13 by the Nuclear Regulatory Commission.

14 And in the performance of compliance, we perform various  
15 patrols in the OCA, in a protected area, in a vital area,  
16 access control. We search personnel. We search vehicles.  
17 We establish compensatory measures for various things.

18 We have CAS and SAS operators that perform assessment,  
19 dispatch personnel to alarms. We have officers that respond  
20 to alarms. We perform various administrative functions to  
21 include payroll.

22 Q. What is radiological sabotage?

23 A. Radiological sabotage would be an effort made by an  
24 external source attempting to come -- breach the security  
25 measures that we have in place to protect nuclear reactors.

1 Q. Would you please outline for us the Company's basic  
2 personnel setup at Turkey Point at the start of 2010?

3 A. You're referring to an organization chart type thing?

4 Q. Would you please describe who you employed by position  
5 and the various levels?

6 A. Okay. I'm the highest-ranking individual within the  
7 Regulated Security Solutions organization at Turkey Point,  
8 so Project Manager. Then below my position there's an  
9 Operations Coordinator, a Training Coordinator, a Leadership  
10 Development Manager.

11 There's various administrative positions and then below  
12 those are the shift positions, which there are a total of  
13 five shifts. There's an Alpha, Bravo, Charley, a Delta.  
14 Each of those shifts has one shift captain, seven  
15 lieutenants, and then approximately 37 officers assigned.

16 And the fifth team, which is referred to as Echo team is  
17 a training team that actually goes and fills for any of the  
18 Alpha, Bravo, Charley teams. As they rotate into training,  
19 this Echo team goes in, takes their spot while this team  
20 goes to the training site so every five weeks a different  
21 team is going into a training cycle.

22 Q. Approximately how many security officers all together  
23 were employed at the facility at the start of 2010?

24 A. Just officers or everybody?

25 Q. I'm asking in terms of security officers.

1 A. Approximately 100 and -- probably 170, approximately.

2 **(Employer's Exhibit 13 marked for identification.)**

3 Q. BY MR. SELEMAN: I'm showing you what's been marked as  
4 Employer Exhibit 13. Do you recognize this document?

5 A. Yes.

6 Q. What is it?

7 A. It's an organizational chart for the Regulated Security  
8 Solutions group.

9 Q. Does this reflect any particular timeframe?

10 A. It would be September of 2009.

11 Q. Would this reflect the operational charts in February  
12 2010 as well?

13 A. Would you ask that again, please?

14 Q. Yes. Would this chart have still been accurate in  
15 February 2010?

16 A. Yes.

17 MR. SELEMAN: I would move for the introduction of  
18 Employer Exhibit 13.

19 JUDGE CATES: Any objection to the one-page Turkey  
20 Point Nuclear organizational chart?

21 MS. PLASS: No objection, Your Honor.

22 JUDGE CATES: I will receive Employer 13.

23 **(Employer's Exhibit 13 received into evidence.)**

24 Q. BY MR. SELEMAN: Who did the officers report to?

25 A. The security officers report to their direct supervisor,

1 which are shift lieutenants.

2 Q. Who do the lieutenants report to?

3 A. Lieutenants report to their direct supervisor, which is  
4 a captain.

5 Q. Are you familiar with Mr. Tom Frazier?

6 A. I am.

7 Q. How so?

8 A. Tom was a shift lieutenant assigned to Bravo team.

9 Q. Are you familiar with Cecil Mack?

10 A. I am.

11 Q. How are you familiar with him?

12 A. Cecil is a shift lieutenant assigned to the Bravo team.

13 Q. Did Mr. Frazier or Mr. Mack have the same position when  
14 employed at Turkey Point immediately before their  
15 termination?

16 A. Yes. They were shift lieutenants.

17 Q. Did their responsibilities include overseeing anyone?

18 A. Yes, they did. They provided oversight to a specific  
19 group of individuals assigned to them for evaluation  
20 purposes and such. However, on a daily basis, there's more  
21 officers assigned to a working schedule -- let me rephrase  
22 that.

23 There's more security officers assigned to a daily  
24 schedule, and they may have contact and oversight with those  
25 individuals during the course of the 12-hour schedule that



1 Q. Who all was that document provided to?

2 A. The Management Challenge was provided to all  
3 supervisors, lieutenants and above.

4 Q. Was it provided to security officers?

5 A. It was not provided to security officers.

6 Q. Is there some reason those three documents were provided  
7 to lieutenants and above, but not security officers?

8 A. Security officers are part of the bargaining unit. They  
9 don't have any supervisory responsibilities. And the  
10 lieutenants, which are our first line supervisors and above,  
11 meet the definition for supervisor.

12 Q. Do lieutenants have any role in disciplining security  
13 officers?

14 A. Yes, they do.

15 Q. Would you please explain that role?

16 A. Sure. If there was a need to provide discipline, the  
17 supervisors, again, are the first line of supervise -- are  
18 the first line. They're direct reports, so the supervisors  
19 can provide discipline to the security officers, bargaining  
20 unit employees.

21 Q. What levels of discipline can lieutenants issue?

22 A. They can issue any discipline excluding termination.

23 Q. Can they do so without consulting with a superior?

24 A. They can.

25 Q. Would you please describe generally how the

1 progressive -- strike that.

2 Does the Company have a progressive discipline policy?

3 A. Yes, we do, a progressive discipline policy.

4 Q. Would you please describe generally how that policy  
5 works?

6 A. Sure. There's a -- there's three different levels.  
7 Level I is the highest level offense, which results in  
8 termination. A Level II -- and that's documented. A Level  
9 II is a written warning. You can go to a written warning on  
10 a first offense, and it identifies how many written warnings  
11 in the policy you can receive before it results in  
12 termination.

13 And then the Level III, which is the lowest level,  
14 typically starts out with a verbal and verbal being  
15 documented in the policy, and then you can receive a certain  
16 number of the verbal documented disciplines before it  
17 progresses to termination as well.

18 Q. If a lieutenant issued a written warning to an officer  
19 for some offense, and the officer committed a similar  
20 infraction in the future, what would happen on the  
21 progressive discipline policy?

22 A. Progressively they'd probably be suspended. So if the  
23 first one was a written, the second one then would  
24 ultimately end up with a suspension.

25 Q. Would somebody higher than a lieutenant have to go back

1 legitimately could put in Level I or Level II or Level III?

2 A. Yeah.

3 Q. Do lieutenants ever issue disciplinary actions?

4 A. Yes.

5 Q. I'm showing you a set of documents that have been marked  
6 as Employer Exhibit 16.

7 **(Employer's Exhibit 16 marked for identification.)**

8 **(Whereupon, the document was handed to the witness.)**

9 Q. BY MR. SELEMAN: Do you recognize these documents?

10 A. Yeah, it's a standard form that we use to document  
11 discipline with our employees.

12 Q. If you'd please look at the first page, do you recognize  
13 the signature of supervisor on that page?

14 A. I do. That's Mr. Evans, Lieutenant Evans.

15 Q. What's Lieutenant Evans' first name?

16 A. Lee.

17 Q. And under the type of action that was issued, what's  
18 listed there?

19 A. Just for clarification, you're looking at action to be  
20 taken? Is that where you're -- what you're asking me?

21 Q. If you look under type of action towards the top, what  
22 type of action --

23 A. Oh, I'm sorry.

24 Q. -- was issued pursuant to this notice?

25 A. The action issue of the discipline was a written warning

1 A. That also is Lieutenant Bob Bogart.

2 Q. And if you'd flip to the last page, do you recognize the  
3 signature of supervisor on that page?

4 A. Yes. And that is Lieutenant Glenda Diaz.

5 Q. Do lieutenants always have to consult with their  
6 superior before issuing discipline?

7 A. No, they don't have to.

8 Q. Can security officers issue disciplinary actions?

9 A. No, they cannot.

10 Q. Do lieutenants have any role in evaluating security  
11 officers?

12 A. Yes, lieutenants perform evaluations on their direct  
13 reports. Each one of them has an assigned number, it's  
14 typically about five per lieutenant, and they also again  
15 assess and have the ability to provide feedback to their co-  
16 lieutenants on the shift for things that they observed  
17 during the course of the shift that may have direct impact  
18 to evaluations of other officers assigned.

19 MR. SELEMAN: I would move for the introduction of  
20 Employer's Exhibit 16.

21 MS. PLASS: I'd like to voir dire.

22 JUDGE CATES: Just one moment and I'll let you.

23 **(Pause.)**

24 JUDGE CATES: You may as long as it's voir dire.

25 **VOIR DIRE EXAMINATION**

1 Q. BY MS. PLASS: Mr. Mareth, did you have any involvement  
2 in preparing this document -- these documents that are part  
3 of Respondent's 16?

4 A. I need to see what she's talking about.

5 **(Whereupon, the document was handed to the witness.)**

6 THE WITNESS: The question was did I have any direct  
7 involvement with the preparation?

8 Q. BY MS. PLASS: Involvement with the -- yes.

9 A. No, I did not.

10 MS. PLASS: I have no objection, Your Honor.

11 JUDGE CATES: Without objection, I will receive  
12 Employer's 16, an eight-page exhibit, which purports to be  
13 disciplinary actions taken by various lieutenants.

14 **(Employer's Exhibit 16 received into evidence.)**

15 **DIRECT EXAMINATION (cont.)**

16 Q. BY MR. SELEMAN: Do the evaluations created by  
17 lieutenants have any role in promotions?

18 A. Yes, they do. The evaluations are used in the  
19 promotional process, our Regulated Security Solutions  
20 promotional process.

21 **(Employer's Exhibit 17 marked for identification.)**

22 Q. BY MR. SELEMAN: I show you what has been marked as  
23 Employer Exhibit 17, which is a five-page document. Do you  
24 recognize this document?

25 A. Yes. This is the Regulated Security Solutions

1 Promotional Policy and Procedure that we use on site.

2 Q. Do you know if lieutenants evaluations of security  
3 officers have ever been considered in connection with the  
4 promotion decision for a security officer?

5 A. Yes, they are.

6 Q. Do you know the names of any of those security officers  
7 off the top of your head?

8 A. Most recently Lieutenant Suarez, Donato, Michael Clarke,  
9 Napier. Those are the ones that come to mind. They're just  
10 our most recent class. There's probably approximately eight  
11 other ones within the last year and a half or so. I just  
12 can't draw all their names at the moment.

13 Q. Is that anything new that's started happening in the  
14 recent past?

15 A. The use of the evaluation in the promotional process is  
16 not new, no.

17 Q. Is there anyone higher than lieutenants that regularly  
18 evaluates the security officers in writing?

19 A. No, no.

20 Q. Are lieutenants responsible for the quality of the  
21 performance of the security officers that report to them?

22 A. Yes, they are.

23 MR. SELEMAN: I would move for the introduction of  
24 Employer Exhibit 17.

25 JUDGE CATES: Any objections?

1 MS. PLASS: No objection, Your Honor.

2 JUDGE CATES: Without objection, I will receive  
3 Employer 15, a five-page document, the Promotion Policy and  
4 Procedures document.

5 **(Employer's Exhibit 17 received into evidence.)**

6 **(Employer's Exhibit 18 marked for identification.)**

7 Q. BY MR. SELEMAN: I'm showing you a seven-page document  
8 that's been marked as Employer Exhibit 18. Would you please  
9 look through these pages and let me know if you recognize  
10 them?

11 A. (Reviews document.) Yes, I recognize them. It's the --  
12 it's a document that we use on site. It's referred to as a  
13 One on One. It's performed with -- well, we perform it with  
14 all levels of -- from officers up to supervision.

15 Q. What happens to a security -- strike that.

16 What could happen to a lieutenant who does not do a good  
17 enough job of ensuring the quality of performance of the  
18 security officers under his or her command?

19 A. The lieutenant could be issued discipline. They could  
20 be issued coaching. They could be issued discipline. They  
21 could be demoted. Ultimately they could be terminated.

22 Q. Look at the last document in Employer's Exhibit 18. Do  
23 you recognize that document?

24 A. Yes, I do. It's the annual performance objectives and  
25 development plan. That's an appraisal that we use.



1           This document and the One on One show that lieutenants  
2 could be disciplined or evaluated poorly if they didn't do a  
3 good job of ensuring that quality. And the promotion -- the  
4 evaluations play in the promotion opportunities for the  
5 lieutenants. These things are extremely relevant to the  
6 legal analysis.

7           JUDGE CATES: You'll have to explain that to me, how --  
8 what I'm looking at, one of the issues I'm looking at is  
9 whether the lieutenants are supervisors within the meaning  
10 of the Act.

11           And you're going to have to establish, if you prevail,  
12 that they effectively, with independent judgment, perform at  
13 least one of the enumerated items in Section 2(11). Now,  
14 how they're disciplined, I just fail to see a connection  
15 here.

16           How the lieutenants are evaluated or how they're treated  
17 by their captains or whomever is above them, how on earth  
18 does that tell me whether these individuals have independent  
19 judgment and exercise it on behalf of the Employer? I think  
20 we're getting one step removed here.

21           MR. SELEMAN: Your Honor, with all respect, and I can  
22 cite you cases, when it comes to trying to define what it  
23 means to responsibly direct other people, okay, one of our  
24 criteria, one of our listed supervisory functions under  
25 2(11) --

1 JUDGE CATES: Yeah, I understand that part.

2 MR. SELEMAN: One way to demonstrate that is that the  
3 punitive supervisors responsible for ensuring that the  
4 people underneath them are doing what they're supposed to be  
5 doing and doing it in a quality manner. And part of proving  
6 that they --

7 JUDGE CATES: I follow you there.

8 MR. SELEMAN: Part of proving that those punitive  
9 supervisors have that responsibility and that it's  
10 meaningful and important is that if that punitive supervisor  
11 doesn't do a good enough job of making sure all those other  
12 people are doing what they're supposed to be doing, that  
13 that punitive supervisor will suffer some consequences.

14 I get a discipline because I'm not doing a good job of  
15 doing my job of overseeing the other people. I get  
16 evaluated poorly because I'm not doing a good enough job of  
17 making sure the people under my command are doing their  
18 jobs. If I get evaluated poorly, when I want a promotion,  
19 that could come back and keep me from getting promoted.  
20 This is part of that legal analysis.

21 JUDGE CATES: But the trouble I'm having with it is, if  
22 you can placate that concern, then perhaps we can move  
23 forward. If not, I'll make a ruling.

24 I am not going to litigate in any way, shape, form, or  
25 fashion whether any lieutenant in the employment of this

1 Company was properly disciplined for failing to carry out  
2 their job.

3 You may be able to show by this document that the  
4 document reflects they received some sort of discipline, but  
5 I am not going to litigate the underlying facts that  
6 constitute whether they got this properly or not is my  
7 problem, my concern, and my ruling will probably be based  
8 accordingly.

9 I have no quarrel with your proffering an exhibit like  
10 this one. Say this exhibit was kept in the normal course of  
11 business and reflects what it reflects, regardless of what  
12 it reflects, but that's as far as I'm going to go. I'm not  
13 going to hear any testimony from this witness on whether he  
14 thought the discipline was warranted, unwarranted, or  
15 anything of that sort.

16 MR. SELEMAN: Your Honor, let me try to ask the  
17 question a different way that perhaps is more acceptable.

18 JUDGE CATES: All right, you can ask.

19 Q. BY MR. SELEMAN: Could a lieutenant be disciplined if  
20 he or she did not do a good enough job of ensuring that the  
21 security officers under his or her command were doing  
22 quality work?

23 A. Yes.

24 Q. What could be the consequences to a lieutenant, who is  
25 evaluated poorly in the future?

1 A. It certainly could impact promotion opportunities, and  
2 it could ultimately result in discipline for that  
3 individual, up to and including termination through the  
4 progressive discipline policy.

5 MR. SELEMAN: I would move for the introduction of  
6 Employer Exhibit 18.

7 JUDGE CATES: Any objection to Employer's 18?

8 MS. PLASS: Again, Your Honor, I have an objection with  
9 respect to the relevance of it in the issues that we have  
10 before us in this case. I mean we have his testimony and  
11 then this case, it doesn't necessarily reflect what it is  
12 he's proposing to say.

13 MR. SELEMAN: Your Honor, it does, but since you've  
14 expressed a desire that I not ask people to, you know, sort  
15 of read to them from exhibits, I'm not going to point them  
16 to particular language in the exhibits. I'll save that for  
17 my brief. I'll explain the legal relevance in the brief.

18 MS. PLASS: That's why I'm objecting to the document.  
19 We have the testimony, and since we're not receiving  
20 testimony concerning the events in this exhibit, I don't  
21 think it's appropriate to have it in evidence to be  
22 considered in a brief.

23 JUDGE CATES: Well, I think I have made my indication  
24 clear, and I will state it as clearly as I can and then  
25 we'll move on.

1 I will, over your objection, accept Employer 18. But  
2 what I'm telling you is that I've heard this witness testify  
3 that things may happen if a supervisor, or if a lieutenant,  
4 whether they're supervisor or employee, if they don't do  
5 their job up to the standards that whoever evaluates them  
6 feels is necessary, that they can take disciplinary action  
7 against them.

8 And I will receive this for the limited purpose that  
9 this witness has stated this is a lieutenant that he  
10 described and that the lieutenant was not living up to,  
11 based on this document, but I'm not going to litigate the  
12 underlying facts that make up this document.

13 In other words, the document I will receive in support,  
14 if it does support his testimony that there are consequences  
15 if the lieutenant does not carry out his job to the  
16 satisfaction of whoever reviews the lieutenant's work. It's  
17 to that limited purpose that I'll receive it.

18 **(Employer's Exhibit 18 received into evidence.)**

19 JUDGE CATES: If you have other questions, you should  
20 ask them.

21 Q. BY MR. SELEMAN: Do security officers create One on One  
22 forms for one another?

23 A. No. Security officers do not create One on One forms  
24 for each other.

25 Q. Do they create annual written evaluations of one

1 another?

2 A. No, they do not create annual written evaluations for  
3 each other.

4 Q. Other than the things that you've already testified  
5 about, what type of tasks did the lieutenants perform on a  
6 daily basis?

7 A. Well, they start out their day essentially attending the  
8 shift briefing. They may have input during the shift  
9 briefings. Once they break out of there, they typically  
10 would issue weapons to officers that are going out into the  
11 field after properly relieving the off-going personnel.

12 So they may be issuing weapons to officers. They  
13 perform inventories of equipment, post inspections. Post  
14 inspections would include verifying the officers have all  
15 their equipment on their posts, they're properly logged in  
16 on their posts, they're fit for duty, answer questions that  
17 may come up of them.

18 That applies to most posts they go to. That's typically  
19 what they do. They're responsible for CAS and SAS  
20 activities, which include assessment and monitoring,  
21 documenting things that are going on during the course of  
22 the shift electronically and/or documenting in hard copy,  
23 say, dispatch personnel to various things. It could be  
24 alarms.

25 It could be something happened in the field that they

1 want to investigate to know more information about. They  
2 respond to various questions or issues that the officers may  
3 have out in the field, to provide guidance or direction and  
4 clarification.

5 They perform observations of the officers. It's a  
6 documented form. It's called a security fundamental  
7 observation. There's a requirement to complete a certain  
8 number of those on a monthly basis, so they may perform  
9 those on any given day.

10 They can address medical related issues to the  
11 employees. They may assist with report writing. They may  
12 assist with condition reports or ARs, as they're now called,  
13 which is a formal process that we use to identify issues  
14 related to -- at the nuclear plant. It can be low level  
15 issues, or it can be the higher tier things that can, you  
16 know, result in safety related events, or equipment that's  
17 broken.

18 They correct, coach, and counsel as needed, so if they  
19 observe something in the field that's not correct, depending  
20 on what the level is, they can -- you know, they can coach  
21 it verbally, they can coach it by documenting it, they can  
22 go to the discipline policy. They can relieve officers that  
23 aren't feeling well on duty or are fatigued.

24 It probably just falls under the FFD policy. There's a  
25 lot of things they can do with that. They're responsible

1 Q. Are there other ways that lieutenants are treated  
2 differently than security officers?

3 A. If treated differently means they get higher wage of  
4 pay, their benefit package has some differences, they have  
5 more freedom to be able to do things during the course of  
6 the day without having to ask for approvals, so yeah.

7 Q. How are the wages for lieutenants different than  
8 security officers?

9 A. Without knowing the exact dollar amount, there's -- the  
10 highest paid security officer to the lieutenants, there's  
11 probably about a \$4 break in there, approximately.

12 Q. Do lieutenants attend any meetings that security  
13 officers do not attend?

14 A. Yes. Well, there's a five-week training cycle, which an  
15 entire team goes into a five-week training cycle. But  
16 during particular cycles when they're in there, there may be  
17 pieces of the training, sections of the training that's  
18 specific to the supervisory core.

19 So they would break out and they would be the only ones  
20 that attend those pieces. There's certainly pieces that  
21 everybody attends. So there's the five-week training cycle.  
22 There's various meetings that we may have before a shift  
23 starts where the Operations Coordinator or I or both of us  
24 ask to speak to all the supervisors before we go into the  
25 shift briefing, so that happens on some occurrence.



1       There's times when we, after the briefing, ask all the  
2 lieutenants to step out and go into a location, it could be  
3 the captain's office, it could be the conference room, and  
4 speak to just the supervisory group on a particular issue.

5       We've had one off site meeting, which we called -- it  
6 was an alignment meeting. Off site meaning away from the  
7 facility where it was to be a more informal type meeting  
8 where we could meet and talk about where we wanted to go  
9 directional-wise as an organization, to align with FP --  
10 Florida Power & Light's goals so that both organizations  
11 were moving more in alignment with one another and trying to  
12 get to the ultimate goals of trying to improve overall  
13 safety, human performance, and just make our organization  
14 better.

15       There have been some meetings that we've had where we've  
16 talked about human performance and we may have a piece with  
17 the whole shift or in the shift briefing, and we may have a  
18 breakout session where we kind of add on to whatever we told  
19 everybody at the briefing, we told something in addition to  
20 the lieutenants and the shift captain and the rest of the  
21 supervisory core.

22       So yes, there are some meetings that are held with just  
23 the supervisory core.

24 Q. Do lieutenants receive any type of initial training  
25 that's different than security officers?

1 A. Initial training meaning once they're promoted to a  
2 lieutenant? If that's the case, yes, they go through  
3 additional training officers don't go through. So they go  
4 through CAS and SAS training. They would go through  
5 response team leader training.

6 There's various tasks. In our security plan it  
7 identifies a certain number of tasks that people have to  
8 perform and there's certain tasks that's set up specifically  
9 just for supervisors. And it's identified on our  
10 qualification card as supervisors only.

11 Fitness for duty, they go through a little additional  
12 training that the officers don't go through so that they  
13 have a better understanding of how to, while they're in the  
14 field performing oversight and observation of day-to-day  
15 activities, how to recognize fatigue, actions to take.

16 With fatigue, there's a lesson plan that goes with that.  
17 I may be wrong on the number. I think it's Lesson Plan 92.  
18 It's fatigue for supervisors. The title may be incorrect,  
19 but that's what it deals with.

20 So it's fitness for duty. So yeah, there are various  
21 training activities that take place at a higher level for  
22 the lieutenants and above, and it would be for the officers.  
23 Those are the ones that come to mind.

24 Q. Are there any occasions where you would meet with the  
25 security officers and exclude lieutenants?

1 Q. BY MR. SELEMAN: Mr. Mareth, if lieutenants were not  
2 considered supervisors by the Company, who would be the next  
3 highest person?

4 A. It would be the captain.

5 Q. And approximately how many people would a captain be  
6 supervising at any one time if the lieutenants are not  
7 supervisors?

8 A. Approximately 37.

9 Q. Would that be feasible?

10 A. No, it wouldn't. It wouldn't be practical. One person  
11 trying to manage and supervise 37 people with the  
12 responsibilities that he has on the shift couldn't do it.

13 Q. Are you familiar with how the structure is set up for  
14 security at other nuclear facilities?

15 A. Yes, I am.

16 Q. Approximately how many other facilities are you familiar  
17 with in that way?

18 A. Probably a total -- approximately 14.

19 Q. Do you know of any other nuclear site where there's a  
20 ratio of captains or somebody equivalent to the security  
21 officers that is anything like that one to 37 type ratio?

22 A. No. All of them are similar to what we have.

23 MR. SELEMAN: Your Honor, I'm about to go into my last  
24 sort of large category of questions for Mr. Mareth. Would  
25 you like me to continue at this time? It's likely to take

1 30 minutes.

2 JUDGE CATES: Yeah, let's get started. I may interrupt  
3 you because I need to take care of some matters between a  
4 quarter of 5:00 and a quarter after 5:00, but I'm sort of  
5 hemmed into that timeframe. And I probably need to get back  
6 to the hotel to do that. So we'll go at least another 20  
7 minutes and see where we're at.

8 Q. BY MR. SELEMAN: Are you aware, as alleged in this  
9 case, that the Company terminated Mr. Frazier and Mr. Mack  
10 in retaliation for bringing issues or complaints to the  
11 attention of management?

12 A. I'm aware of that.

13 Q. What do you think about that allegation?

14 A. It's incorrect. It's false. They were not terminated  
15 for those reasons.

16 Q. Generally speaking, how does the Company think about  
17 complaints?

18 A. I guess from our perspective we're open to them. I mean  
19 we spend a lot of time encouraging people to bring issues  
20 forward to us. We have processes in place to bring issues  
21 forward to us. We speak to those issues during our shift  
22 briefings on a regular basis.

23 We include it in our five-week training cycle. We  
24 invite Employee Concerns representatives over at least on an  
25 annual basis to speak to all of the employees. We have our

1 Safety Conscious Work Environment program that we speak to.  
2 We have postings up out in the hallway that are safety  
3 conscious, Safety Conscious Work Environment related that we  
4 change out on some frequency.

5 I think we do more than a satisfactory job of  
6 communicating our desires as an organization, as well as  
7 FPL, that we want people to bring issues forward to us and  
8 the avenues in which they can do that.

9 Q. Generally speaking, what is SCWE or Safety Conscious  
10 Work Environment?

11 A. It's a process -- actually the Nuclear Regulatory  
12 Commission requires it. It's in our contract with FPL. FPL  
13 has a similar process and all contractors out there, I'm  
14 sure in their contracts with FPL, have a similar process.

15 But it's an environment where individuals can come  
16 forward to the NRC, to the FPL, to our organization, report  
17 anything without the fear of being retaliated against.

18 Q. What type of issues are covered by SCWE?

19 A. It can be -- it can be anything. It can be broke/fix  
20 things, which are, I guess, a nuclear term for equipment  
21 that's broke needs to be fixed. It can be lower level  
22 things. A person could write an issue -- let me rephrase  
23 that.

24 An individual could bring anything forward. It could be  
25 the toilet paper in the bathroom is too coarse and they want

1 to see that changed out. If can be at the higher spectrum  
2 where it's safety related, industrial, or nuclear related,  
3 so it's everything in between. Literally, they can bring  
4 anything forward.

5 And then it's a process of where do you fit the issue,  
6 into what bucket? Bucket meaning where does it fit in the  
7 gamut and what level of attention does it get, immediate, or  
8 is it something down the road that may take a year to fix or  
9 longer?

10 A good example would be our vests. The issue came up  
11 and it's come up for a long time. Since I've been there  
12 I've heard about that and we just changed those out 30 days  
13 or so ago.

14 Q. Does the SCWE concept or procedure cover all of the  
15 issues that you've heard Mr. Frazier and Mr. Mack testify  
16 they brought to the attention of management?

17 A. All of them? Yeah, I would say so because it's open.  
18 It can cover anything, so yes.

19 Q. Is the SCWE issue important to the Company?

20 A. Very much so. We spend a lot of time reinforcing it,  
21 communicating it, so yes, very important. It has more  
22 impact -- it has a lot of impact to the Company. It can  
23 impact our profit award that we receive from FP&L on an  
24 annual basis, but it's more important than just a profit.

25 It's -- ultimately, you're trying to ensure that the

1 employees have a safe environment to work in.

2 Q. Can it affect -- can the Company's SCWE performance or  
3 performance related to SCWE affect your personal  
4 compensation?

5 A. Yeah, my bonus can be impacted negatively by poor  
6 performance.

7 **(Employer's Exhibit 19 marked for identification.)**

8 Q. BY MR. SELEMAN: I'm showing you an 11-page document  
9 that's been marked as Employer Exhibit 19. Would you please  
10 look at this document and tell me if you're familiar with  
11 it?

12 A. (Reviews document.) Yes, I'm familiar with it. It is  
13 our Company policy for Safety Conscious Work Environment.

14 Q. Do you see that throughout this policy there are  
15 references to Site Supervisors?

16 A. Yes.

17 Q. Who does that -- who do those references refer to?

18 A. The lieutenants and above, up to my level.

19 MR. SELEMAN: Move for the introduction of Employer  
20 Exhibit 19.

21 JUDGE CATES: Any objection?

22 MS. PLASS: I'm almost through looking at the document.

23 JUDGE CATES: Okay, continue. Let us know when you  
24 are.

25 **(Whereupon, Ms. Plass reviewed the document.)**

1 THE WITNESS: Do I still have the question open to me  
2 that he originally asked?

3 JUDGE CATES: No, you've made your comments. We're  
4 giving her a chance to examine this document.

5 THE WITNESS: Understand.

6 MS. PLASS: No objection, Your Honor.

7 JUDGE CATES: I will, without objection, received  
8 Employer 19, an 11-page exhibit, the caption the Policy  
9 Manual for Safety Conscious Work Environment.

10 **(Employer's Exhibit 19 received into evidence.)**

11 Q. BY MR. SELEMAN: Generally speaking, does the policy  
12 set forth in Employer Exhibit 19 set forth responsibilities  
13 for lieutenants -- I'm sorry, Employer Exhibit 19? Does it  
14 set forth responsibilities for lieutenants?

15 A. Yes, it does. There again, they're identified as first  
16 line supervisors. Issues are brought forward to them. The  
17 expectation would be that they address the issues, which can  
18 include pushing it up as high as my level, pushing it to  
19 FPL. Pushing it simply meaning taking it to the appropriate  
20 avenue to try to get it resolved, or resolve it at their own  
21 level.

22 Q. Generally speaking, does this policy provide for any way  
23 that the Company's or the site, or the Turkey Point site's  
24 SCWE performance is going?

25 A. Yes. The -- we have a quarterly evaluation that's



1 conducted. We receive from our corporate headquarters a  
2 list of 25 employees on a quarterly basis that we are to go  
3 out and solicit -- there's an actual form in here. I think  
4 it's -- let me find it.

5 It's Page 9 of 11. So we're sent on a quarterly basis,  
6 to the named 25 individuals. It's randomly selected. It  
7 can include me all the way down to the security officers.  
8 And of those 25 individuals, we go out, Dr. Macdonald and I  
9 normally sit down with the individuals. And what we do is  
10 we either bring them into our location up in our office  
11 area, or we'll go into the field in some occasions, and we  
12 explain that they've been selected randomly for the survey.

13 The survey has five questions for the SCWE piece, and  
14 then there's additional questions for an employee  
15 satisfaction piece that we inform the individuals who are  
16 sitting down with us that this going to be anonymous.

17 We know the 25 people because those names are provided  
18 to us, but when they fill out the form, they do not identify  
19 the shift they're on. The only thing they put on there is  
20 the answer to the question. Then they date the document.

21 The document's then folded up, put into an envelope.  
22 That envelope is sealed. Those are given back to whoever it  
23 was that administered this. We place those into a sealed  
24 envelope, larger envelope, and then we send those off to our  
25 company representative, the person that's responsible for

1 about here, this actually rolls-up -- I know it at least  
2 goes up to our company president, so he sees the results of  
3 all the sites. So this isn't just our site.

4 This is throughout the FPL fleet that's within our  
5 organization, so other sites use this as well. This data  
6 rolls-up to the president and my immediate boss, who's the  
7 vice president. And if we don't pass certain criteria, then  
8 we get feedback on usually what corrective actions we're  
9 going to take to get within our accepted standard, and the  
10 accepted standard's 80 percent or better.

11 **(Employer's Exhibit 20 marked for identification.)**

12 Q. BY MR. SELEMAN: I'm showing you an 11-page document  
13 that's been marked as Employer Exhibit 20. Are you familiar  
14 with this document?

15 A. I am. This is the Safety Conscious Work Environment  
16 handbook. This is the document that's issued to employees.

17 Q. Who all gets --

18 A. This is handed to all employees during the initial  
19 hiring so after they've actually been selected and start  
20 their training.

21 **(Employer's Exhibit 21 marked for identification.)**

22 Q. BY MR. SELEMAN: And I'm showing you a 14-page document  
23 that's been marked as Employer Exhibit 21. Do you recognize  
24 that document?

25 A. Yes, I do.

1 Q. What is it?

2 A. This is a -- it's an additional document that also deals  
3 with Safety Conscious Work Environment. This is provided to  
4 supervisors, all supervisors and above.

5 Q. Does that include lieutenants?

6 A. Yes, lieutenants are included in that.

7 Q. Why are the lieutenants and higher given another book?

8 A. It's so that they understand how important the SCWE is  
9 to the organization. If you look, I believe, on the second  
10 page, there's a comment in there from Eric Wilson, who at  
11 that time was the CEO of the Company -- excuse me, I'm  
12 sorry. He was the president of the Company before he became  
13 the CEO.

14 It helps, I think, give an overview of what the  
15 respons -- what our responsibilities are as supervisors, and  
16 in administering and ensuring that we do provide the Safety  
17 Conscious Work Environment.

18 Q. Do lieutenants have any type of different role in the  
19 SCWE process and procedures than security officers?

20 A. Yeah. I think security officers -- security officers --  
21 anyone can bring up issues. Security officers tend to push  
22 their issues up to various levels. They don't have to go  
23 through a lieutenant and a captain, etc., to get to me.

24 They don't even have to go through our organization.

25 They could go to FPL, immediately they go to the NRC, but as

1 lieutenants and above, our responsibility is to address the  
2 issue and not just hear what they're saying and leave it.  
3 We need to address it, to try and resolve it, whatever that  
4 resolve may be.

5 MR. SELEMAN: I'd move for the introduction of Employer  
6 Exhibit 20 and 21.

7 JUDGE CATES: Any objection?

8 MS. PLASS: One moment, Your Honor.

9 JUDGE CATES: All right.

10 **(Whereupon, Ms. Plass reviewed the documents.)**

11 MS. PLASS: I have no objection, Your Honor.

12 JUDGE CATES: I will, without objection, receive  
13 Employer's 20 and 21.

14 **(Employer's Exhibits 20 and 21 received into evidence.)**

15 JUDGE CATES: And at this point, I'm going to go off  
16 the record for just a moment here.

17 **(Off the record.)**

18 JUDGE CATES: On the record.

19 At this point, we'll be in recess until 9:00 a.m. in the  
20 morning.

21 **Off the record.**

22 **(Whereupon, at 4:50 p.m., the hearing in the above-entitled**  
23 **matter was adjourned, to reconvene the next day, Wednesday,**  
24 **April 6, 2011, at 9:00 a.m.)**

25

26

1 To the extent that this could conceivably have enough  
2 weight to come under Federal Rule of Evidence -- I always  
3 get them backwards because I'm dyslexic -- 401 of the  
4 Federal Rules of Evidence or 104, whichever one speaks to  
5 relevant evidence, I will deem it relevant enough to meet  
6 that requirement and would overrule the objections of  
7 General Counsel and receive it.

8 **(Employer's Exhibit 22 received into evidence.)**

9 Q. BY MR. SELEMAN: Mr. Mareth, is a survey -- is the type  
10 of survey that's reflected in Employer's Exhibit 22  
11 conducted every quarter for the Turkey Point facility?

12 A. Yes, it is a quarterly survey.

13 Q. What do you do based on -- strike that.

14 Did a point in time come when you decided you needed to  
15 do something to try to create a better SCWE environment?

16 A. Yes, in 2009 I'm going to -- in 2009, we didn't have  
17 real good results in our SCWE quarterly results, as well as  
18 just in general feedback. So what we attempted to do was  
19 spend more -- what we attempted to do was solicit more  
20 information, get individuals to better understand the SCWE  
21 program, what we were trying to do with the data to try and  
22 improve overall knowledge, as well as resolve issues that  
23 were being brought forward.

24 **(Employer's Exhibit 25 marked for identification.)**

25 Q. BY MR. SELEMAN: I'm showing you a two-page document

1 that's been marked as Employer Exhibit 25. Are you familiar  
2 with this document?

3 A. Yes, I am. We refer to it as First 48 because it's just  
4 got 48 items identified on it. These are issues that have  
5 been brought up to us through various vehicles, five-week  
6 training cycle sessions, issues that were brought up, it  
7 could have been through e-mails, it could have been brought  
8 up through CAP process, it could have been brought up at  
9 shift briefings, a lot of different vehicles.

10 And what we did is put them into this list and then  
11 tried to work -- we worked this list down. Some of them had  
12 higher priorities than others based on what they were.

13 Q. When was this list created?

14 A. I believe we put this together in probably the -- I  
15 think it was the fourth quarter of 2009.

16 Q. Has this document changed at any time?

17 A. It's been -- items have been updated as they've been  
18 getting completed.

19 Q. Do you know if any of the issues that Mr. Frazier or  
20 Mr. Mack identified as issues they raised appear on this  
21 document?

22 A. Item Number 29 is in reference to the vests, so that's  
23 one of the similar issues. Item Number 34 is in reference  
24 to Porta-lets, so that's been an issue identified. Item 36,  
25 again, is a similar Porta-let issue in a different location

1 that has been brought up by Tom.

2 So glancing through, those are several of the items that  
3 are similar or the same.

4 MR. SELEMAN: I would move for the introduction of  
5 Employer Exhibit 25.

6 MS. PLASS: Voir dire, Your Honor, please?

7 JUDGE CATES: You may as long as it's voir dire.

8 **VOIR DIRE EXAMINATION**

9 Q. BY MS. PLASS: Mr. Mareth, did you prepare this  
10 document, Employer's Exhibit Number 25?

11 A. I would have been involved in -- actually, Dr. Macdonald  
12 would have been the one that actually, you know, entered the  
13 data on to it. However, it was a combination of myself,  
14 her, and I believe Juan Rodriguez was involved in kind of  
15 gathering all the data to put in here, but she actually put  
16 it into the system.

17 Q. And you say you don't know the date of this document?

18 A. I can't give you an exact date, no.

19 MS. PLASS: I have no objection, Your Honor.

20 JUDGE CATES: I will, without objection, receive the  
21 two-page exhibit captioned for my purposes, the First 48.

22 **(Employer's Exhibit 25 received into evidence.)**

23 **(Employer's Exhibit 26 marked for identification.)**

24 Q. BY MR. SELEMAN: I'm showing you a one-page document  
25 that's been marked as Employer Exhibit 26. Do you recognize

1 this document?

2 A. Yes, I do. And this is a document that it's identified,  
3 it shows a time line and it shows various things that the  
4 organization, Regulated Security Solutions had taken various  
5 actions or steps to work to improve the SCWE knowledge and  
6 understanding to help improve the overall SCWE scores and  
7 results that we were getting.

8 Q. Do you know what period of time is reflected on this  
9 document?

10 A. Yeah, it started in the third quarter of 2009 and  
11 continued through the month of December of 2009.

12 Q. Do you see a reference to SCWE with Mike Mareth under  
13 the August 18th to September 18th entry?

14 A. Yes. That's in reference to our five-week training  
15 session. Myself, and if I wasn't available, Juan Rodriguez  
16 would have attended. And during the five-week training  
17 sessions when Karen was going over SCWE, then we made  
18 ourselves available to go over there, hear feedback, answer  
19 questions that people would have had on really any topic.

20 Q. Was this document presented to the folks that work at  
21 Turkey Point any way?

22 A. Yeah, it was, it was given to them just so they  
23 understood things that we had completed and the actions that  
24 were being taken, again, so that it made it more visual what  
25 we were doing. Sometimes you kind of lose track of what you



1           They certainly can discuss the issue with their shift  
2 captain, make them aware of it, and -- but they do have some  
3 latitude depending on the severity of it, of where it may  
4 land in progressive discipline policy.

5 Q.   What is a CR?

6 A.   A CR is a condition report. It's part of the corrective  
7 action program. It's either an electronic or a hard copy  
8 form that's filled out that has specific data that you need  
9 to complete. And what it essentially does is identify what  
10 the issue is, who identified it, a brief description of what  
11 it is, whether or not you have recommendations to resolve to  
12 fix it, and then that's submitted and goes into the  
13 corrective action program.

14 Q.   What is the corrective action program?

15 A.   The corrective action program is a procedure -- a  
16 process that the nuclear industry is required to have by the  
17 Nuclear Regulatory Commission, and it's a program where all  
18 employees that work at the station have the opportunity to  
19 either file an electronic or a hard copy version of whatever  
20 their issue may be so that it can get to the appropriate  
21 people, which is the Management Review Committee.

22       All the CRs are reviewed. They're prioritized and  
23 they're assigned some level of action. And then they're  
24 tracked through their completion. So --

25 Q.   In terms of the issues that Mr. Frazier and Mr. Mack say

1 they raised to management, at issue in this case, are all of  
2 those issues -- I'm sorry -- could all of those issues have  
3 been raised under this condition report process?

4 A. Yes, they could. Any issue can go into the corrective  
5 action program as long as you don't divulge confidentiality.

6 Q. Were there any efforts, during your tenure as Project  
7 Manager, to educate the workforce about the condition report  
8 process?

9 A. Yes. We spent time at shift briefings talking, not only  
10 myself, the Operations Coordinator Juan Rodriguez may talk  
11 to it as well, or even the shift captains, but we reinforced  
12 the corrective action program on a regular basis.

13 We have attended shift briefings and provided the  
14 information during the briefings about certain issues that  
15 need to go into the corrective action program, just kind of  
16 lessons learned. We also have our five-week training  
17 session where we've provided training to the officers, to  
18 all shift personnel on corrective action program and how to  
19 initiate CRs.

20 Q. Is Mr. Frazier the only one of the Company's people at  
21 Turkey Point who has -- who initiated a CR in say 2009 and  
22 the start of 2010?

23 A. No. I'm sure there's many, many, many, many CRs  
24 generated by other lieutenants, officers, captains, at  
25 various levels.

1 A. No. No, they have not, nor would we terminate them for  
2 generating CRs, or bringing issues up through the CR  
3 process.

4 JUDGE CATES: Listen to the question he asks you and  
5 just answer what he asked you.

6 THE WITNESS: Understood.

7 MR. SELEMAN: I would move for the introduction of  
8 Employer Exhibit 46, Your Honor, a two-page document that  
9 previously was the last two pages of what was offered, I  
10 believe, as Employer Exhibit --

11 JUDGE CATES: Without objection, I receive  
12 Employer's 46, a two-page exhibit.

13 **(Employer's Exhibit 46 received into evidence.)**

14 Q. BY MR. SELEMAN: In addition to what you've already  
15 testified about, are there any other ways that issues come  
16 to the attention of management?

17 A. Yeah. An individual can bring an issue up through  
18 e-mails. An individual can bring issues up verbally.  
19 Individuals can bring issues up through -- well, they could  
20 use our Safe to Say program, they can use the employee  
21 concerns program of Florida Power & Light. They can use our  
22 SCWE program, so there's multiple methods that somebody can  
23 bring an issue forward.

24 **(Employer's Exhibit 32 marked for identification.)**

25 Q. BY MR. SELEMAN: I'm showing what's been marked as

1 Q. BY MR. SELEMAN: What are these documents in Employer  
2 Exhibit 32?

3 A. The documents that are attached in here are safety  
4 meeting notes for various monthly meetings that we held  
5 during the year of 2009, we being the Safety Committee. The  
6 Safety Committee is made up of members of the security  
7 force.

8 Q. What happens at these meetings?

9 A. We discuss safety related topics. We discuss some  
10 issues that may not necessarily fit into the safety realm.  
11 We kind of set those to the side and address those, but  
12 separately. Issues that we bring up that we feel need to go  
13 into the corrective action program, or it's appropriate for  
14 them to go in there, we recommend that the person bring it  
15 up to issue, go back and initiate the CR, which is the  
16 condition report, to get it into the corrective action  
17 program.

18 There's times where another member may initiate the  
19 condition report for the person that's submitting it.  
20 However, typically we like to see the person that's bringing  
21 the issue forward, get it in in their own words.

22 Q. Do you --

23 A. We also status -- I'm sorry. We also status the  
24 meetings as far as previous notes and what those statuses  
25 are.

1 with management that are reflected in these safety meeting  
2 minutes?

3 A. I'm looking through the document at this moment.

4 **JUDGE CATES: Off the record.**

5 **(Off the record from 9:38 a.m. to 9:50 a.m.)**

6 **JUDGE CATES: On the record.**

7 Company counsel, you may continue if you have other  
8 questions.

9 Q. BY MR. SELEMAN: Mr. Mareth, are there issues that  
10 Mr. Frazier and Mr. Mack have testified that they raised  
11 with management that are reflected in these safety meeting  
12 minutes?

13 A. Yes. If you look at Page Number 1, Item Number 4 deals  
14 with cleaning supplies. Item Number 6, load bearing vest.  
15 The next page, Item Number 2, water related issues. Item  
16 Number 9, hand washing station. That has to do with Porta-  
17 lets.

18 On the next page, Item Number 1, checkpoint issues have  
19 been addressed or brought up by them. Skip the next page.  
20 I didn't see anything specific there. Skip the next page.  
21 Didn't see anything specific there. Skip the next page.  
22 Skip the next page. Skip the next page. Skip the next  
23 page.

24 We should now all be on Subject May 2009, Item 5,  
25 longstanding sanitary conditions. Item Number 6, cleaning

1 supplies. On the next page, Item Number 10 deals with the  
2 gas mask pouches. On the next page, let's see, Item  
3 Number -- Number 8. Again, it's a cleaning supply related  
4 issue there. Item Number 10, dealing with the checkpoint.

5 Skip the next page. Skip the next page. On this, the  
6 page that I'm looking at now should start with Number 7  
7 through Number 15. And this one, Number 9 deals with the  
8 tactical vest. That's the vest they've identified issues  
9 with. Item Number 12 is a door that is difficult to open  
10 that has been brought up in the past by them.

11 Skip the next page. Skip the next page. The page you  
12 sound be looking at starts with Number 6 and goes through  
13 Number 12. There's a handwritten note in the left-hand  
14 column that says provide to Sean. This one, Item Number 7,  
15 again it's a gas mask related type issue.

16 Item Number 9 deals with terminal availability for  
17 officers. The Item Number 10 again is the vest related  
18 issue. Item Number 11, the restroom facilities. Again,  
19 that's kind of going back to the Porta-let, or lack of an  
20 actual restroom.

21 Skip the next page. Skip the next page. Now looking at  
22 Subject November 2009, under safety events, this identified  
23 where a chair actually had broken, so we had a discussion  
24 about this. It ties to the issue brought up about chairs  
25 availability and that issue. Item Number 4, BRB cleaning

1 not sufficient. Issues have been brought up about that.

2 The next page, Item Number 1 talks to the new chairs  
3 that were put out there and feedback that we were receiving  
4 in reference to those. Next page Item Number 11 again goes  
5 to the whole restroom and sanitary facility Porta-let  
6 related issue. And Item Number 12 again deals with that  
7 tactical vest. And on the last page nothing.

8 So all those items that I just went through are items  
9 that Mr. Frazier, Mr. Mack have brought up and are similar  
10 to these items that were identified during safety meetings,  
11 monthly safety meetings that we've held.

12 Q. Calling your attention to the seventh page of the  
13 document --

14 A. If I counted correctly, it starts with Number 7 and goes  
15 through Number 10.

16 Q. Would you please read Number 9 to yourself and tell us  
17 what that issue is about?

18 A. (Reviews document.) Yeah, the issue -- it deals with  
19 the load bearing vest or tactical vest. You'll probably  
20 hear it referred to as different things, but it's the same.  
21 The issue there is the vest itself, plus the equipment that  
22 an officer would carry weighs about approximately 40 pounds  
23 in total.

24 And the issue is that in the summer months, it's hot,  
25 it's heavy, it's somewhat uncomfortable for individuals, and

1 the whole issue there was dealing with the weight and the  
2 heat that produces rather than letting the body expel that  
3 heat in the South Florida area.

4 Q. Is that something that Mr. -- you've heard Mr. Frazier  
5 testify was an issue he raised with management?

6 A. Yes.

7 MR. SELEMAN: I'd move for the admission of Employer  
8 Exhibit 32.

9 MS. PLASS: Voir dire, Your Honor?

10 JUDGE CATES: You may as long as it's voir dire.

11 **VOIR DIRE EXAMINATION**

12 Q. BY MS. PLASS: Mr. Mareth, there are some handwritten  
13 notations on certain pages. The first page shows some  
14 handwriting at the bottom right corner.

15 A. Correct.

16 Q. And --

17 JUDGE CATES: Let me ask if you're offering it for any  
18 of the handwritten part?

19 MS. PLASS: Yes.

20 MR. SELEMAN: No, Your Honor.

21 MS. PLASS: Okay.

22 JUDGE CATES: Then I won't consider any of the  
23 handwritten notes.

24 MS. PLASS: Very well. Then with that assurance, I  
25 have no objection, Your Honor.



1 JUDGE CATES: I will receive Employer's 32, a 44-page  
2 security personnel document.

3 **(Employer's Exhibit 32 received into evidence.)**

4 **DIRECT EXAMINATION (cont.)**

5 Q. BY MR. SELEMAN: Was Mr. Frazier terminated for  
6 bringing issues to the attention of management?

7 A. Absolutely not.

8 Q. Was Mr. Mack terminated for bringing issues to the  
9 attention of management?

10 A. No, absolutely not.

11 Q. Does terminating either of those individuals for  
12 bringing issues to the attention of management make any  
13 sense to you?

14 A. No, it does not. We encourage, as I testified  
15 previously, that we encourage all of our employees to bring  
16 issues forward through the various processes that we have.

17 Q. Generally speaking, how has the Company's performance  
18 been at this facility over the last, let's say, 10 years?

19 A. Prior to me arriving here in 2008, I would say their  
20 performance was not ideal --

21 Q. How about --

22 A. -- as far as --

23 Q. Excuse me.

24 A. -- as far as the ratings that we receive.

25 Q. How about the performance of supervisors specifically?

1 A. It's a direct reflection, so we've -- we haven't hit the  
2 mark in our performance of supervisors as well because we  
3 didn't have the right oversight of the officers in the  
4 field.

5 Q. Did a point in time come when the Company decided to try  
6 to do something different with its lieutenants and captains?

7 A. Yes. We initiated leadership effectiveness program  
8 to -- well, prior to that we had established a leadership  
9 development manager and through her we were working to  
10 improve our overall performance in the supervisor and the  
11 officer's ranks as well.

12 Q. Was that your decision?

13 A. No.

14 Q. Who made that decision?

15 A. That was a contractual decision that was made. It would  
16 have been between Florida Power & Light and our senior  
17 executives from Headquarters Office.

18 Q. Did the Company do anything else to handle its  
19 lieutenants and captains differently?

20 A. Yes. We also implemented leadership effectiveness  
21 reviews of all of our supervisors.

22 Q. Was that your decision to do that review?

23 A. No. That was a directive from -- out of our  
24 headquarters office, which would have come from Tim Kendall,  
25 who was the Company president.

1 Q. Generally speaking, what were the results of that  
2 review?

3 A. Well, we completed the review. There was a number of  
4 individuals that were terminated because they didn't meet  
5 the expectations.

6 Q. Was Mr. Frazier one of those individuals?

7 A. Yes, he was.

8 Q. Was Mr. Mack one of those individuals?

9 A. Yes, he was as well.

10 Q. Was the result of the leadership effectiveness review  
11 the only reason that Mr. Mack was terminated?

12 A. Mr. Mack was involved in a situation that involved --

13 MS. PLASS: Objection, Your Honor. It's non-  
14 responsive.

15 JUDGE CATES: I'm sorry?

16 MS. PLASS: He's not answering the question.

17 JUDGE CATES: He asked him was there any other basis  
18 for separating Mr. Mack, other than the supervisor review  
19 program and he started to answer. And I haven't heard what  
20 he's going to say yet, so I'm going to allow him to finish  
21 at least his sentence.

22 THE WITNESS: Mr. Mack was involved -- the answer is  
23 yes. Mr. Mack was involved in a situation with a Security  
24 Manager, who's the highest FPL representative assigned to  
25 the site, that he displayed undesirable behavior.

1 Q. BY MR. SELEMAN: In what way?

2 A. He had a confrontation, a verbal confrontation out in a  
3 public area, which is referred to as the hallway, where  
4 personnel process in on a daily basis, and used vulgarity to  
5 describe a situation that had occurred down there.

6 Q. Why was that a problem?

7 A. The client -- well, the location it was conducted in.  
8 You've got multiple people that come through there on a  
9 daily basis that can observe and see and witness, you know,  
10 what's going on and he is our client. It's inappropriate to  
11 speak to him like that.

12 **(Employer's Exhibit 34 marked for identification.)**

13 Q. BY MR. SELEMAN: I'm showing you what's been marked as  
14 a four-page document that I've marked as Employer Exhibit  
15 34. Do you recognize these pages?

16 A. Yes, I do.

17 Q. What are they?

18 A. The first document is the employee discipline record  
19 that was issued to Cecil Mack as part of his termination.  
20 The second document is an e-mail that was provided upon my  
21 request from Charles Sengenberger, who was one of the  
22 Security Coordinators that works for Mr. Rittmer for FP&L,  
23 and it's a brief description of what he observed and heard.

24 The third document is an e-mail from Mr. Rittmer. It's  
25 a summary of what occurred from his perspective, being

1 involved in that discussion with Mr. Mack and the third --  
2 I'm sorry, the fourth page is an e-mail from Mr. Ostensen,  
3 also Florida Power & Light representative, he's the  
4 coordinator for the CAP program for the Security Department,  
5 and this is his statement of what he observed that occurred  
6 between Mr. Rittmer and Mr. Mack.

7 Q. During your tenure, have other security officers brought  
8 issues of concern to the attention of management?

9 A. Yes, it happens pretty much on a daily basis.

10 Q. Have lieutenants brought issues to the attention of  
11 management?

12 A. That also happens on pretty much a daily basis.

13 Q. Is there anyone who raised issues more often than  
14 Mr. Frazier?

15 A. More often? I don't know that -- I don't necessarily  
16 keep track of who brings the most issues forward. So there  
17 are plenty of people who bring issues up on a regular basis.

18 MR. SELEMAN: Your Honor, I'd move for the introduction  
19 of Employer Exhibit 43.

20 MS. PLASS: 43?

21 JUDGE CATES: That was the 136-page document we never  
22 came back to.

23 MS. PLASS: Oh, I thought we did.

24 MR. SELEMAN: No.

25 MS. PLASS: I have no objection, Your Honor, to 43.